Supreme Court, U. S.
FILED
NOV 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-757

OLD DOMINION FREIGHT LINE, INC
AND BARNES TRUCK LINE, INC.
Appellants

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina Greensboro Division

JURISDICTIONAL STATEMENT

FRANCIS W. MCINERNY
RICHARD A. MEHLEY
1000 - 16th Street, N.W.
Washington, D.C. 20036
Counsel for Appellants

Of Counsel:

MACDONALD & MCINERNY
1000 - 16th Street, N.W.
Washington, D.C. 20036

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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JURISDICTIONAL STATEMENT

Appellants, Old Dominion Freight Line, Inc. and Barnes Truck Line, Inc., appeal from the Judgment of the United States District Court for the Middle District of North Carolina, Greensboro Division, dismissing their complaint to set aside orders of the Interstate Commerce Commssion (Commission), and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and

that substantial questions involving proper administration of Section 5 of the Interstate Commerce Act and the Administrative Procedure Act are present and warrant plenary review.

OPINION BELOW

The opinion of the District Court (App. C, *infra*, pp. 9a-13a) is not yet officially reported. The Commission did not write a report in support of the entry of its orders (App. D, *infra*, pp. 14a-81a).

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253. *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Assn.'s, Inc.* v. *United States*, 364 U.S. 1 (1960). Judgment of the District Court was entered on September 8, 1975 (App. E, *infra*, pp. 82a-83a), and Notice of Appeal was filed in the District Court on September 25, 1975 (App. B, *infra*, pp. 7a-8a).

STATUTES INVOLVED

The Interstate Commerce Act, Sections 5 (2) (a), 5 (2) (b), 5 (2) (c), 210a(b) (49 U.S.C. §§ 5 (2) (a), 5 (2) (b), 5 (2) (c), 310a (b)); the National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, 1001); the Administrative Procedure Act, Sections 557 and 706 (5 U.S.C. §§ 557 and 706) (App. A, *infra*, pp. 1a-6a).

QUESTIONS PRESENTED

1. Whether the report and orders of the Interstate Commerce Commission in a section 5 acquisition proceeding meet with the requirements of the Administrative Procedure Act (5 U.S.C. §§ 557 (c) and

706(2)), the Commission's own rules of decision, and decisions of this Court when it finds certain portions of a motor carrier's operating authority to be non transferable without explanation.

2. Whether the District Court's failure to require the Interstate Commerce Commission's adherence to, and application of, its long-established dormancy standard in evaluating appellant Barnes' operating authority is in direct conflict with another District Court's holding in *Wright Trucking, Inc.* v. *United States*, Civil Action No. 73-1445-C, decided April 3, 1975 (U.S. D.C. Mass.).

3. Whether a dormancy finding with respect to certain motor carrier's operating authority is arbitrary, capricious and an abuse of discretion where the Commission only two years before the instant transaction, found the very *same* authority to be transferable upon application of traditional transfer standards to fewer and less diverse shipments.

4. Whether, in view of vendor's general commodity transportation activities, the ordered cancellation of such authority, except for a few items, constitutes an "atomization" of general commodity authority contrary to this Court's decision in *United States* v. *Carolina Freight Carriers*, 315 U.S. 475, 483-84 (1942).

5. Whether the Commission is required under the Interstate Commerce Act, when approving transfer of substantially less operating authority than contracted for by the parties, to consider the effect of such reduced operating authority upon the vendee carrier's system operations, especially in light of changed oper-

ating circumstances that have occurred during the pendency of the application.

6. Whether an agency's mere conclusion that transfer of substantially reduced operating right would not "adversely affect" carrier employees satisfies the requirements of the Administrative Procedure Act and Interstate Commerce Act, when facts of record support a contrary conclusion.

STATEMENT

By application filed June 24, 1969, appellant Old Dominion Freight Line sought Commission authority under Section 5 of the Interstate Commerce Act (49 U.S.C. § 5(2)) to acquire appellant Barnes Truck Lines. Simultaneously with that filing, a corresponding Section 210a(b) [1] application was filed wherein Old Dominion sought temporary authority to control Barnes through management. A verified statement accompanied that application describing the management crisis at Barnes due to the recent death of its two principal owners and managers, which condition, if allowed to continue, would adversely affect the Barnes properties and its ability to continue serving the public. The Commission, by order dated July 16, 1969,[2] authorized Old Dominion to acquire temporary management control of Barnes, which control continued for over six (6) years.

[1] 49 U.S.C. § 310a(b) (App. A, *infra*, pp. 3a-4a). That section permits the Commission to grant such authority pending determination of the corresponding permanent authority application if it appears that the vendor's properties may be destroyed or injured or its continued operation would substantially interfere with their future usefulness in the performance of service to the public.

[2] Extended by order of December 16, 1969, until the Section 5 application "finally determined."

Hearings on the Section 5 application were held in December, 1969, at which four motor carriers appeared in opposition to the application. By initial decision dated June 30, 1972, the Administrative Law Judge found that: (1) the transaction would be beneficial to Old Dominion and would preserve Barnes' operations resulting in a better service to the public, (2) while Barnes' general commodity rights were "not 'dormant' insofar as it actually operated thereunder," said rights were, with certain exceptions, "practically dormant" and should be cancelled, and (3) the application should be denied without prejudice to its resubmission or amendment proposing Old Dominion's acquisition of Barnes "and merger of the latter into the former with the duplicate and dormant rights . . . eliminated." [3] (App. D, *infra*, pp. 51a-54a)

There were no findings or discussion with respect to Barnes' specific commodity authorities.

In December, 1972, appellants petitioned the Commission to change their application from a control through stock acquisition to a merger transaction, requested imposition of certain restrictions, took issue with the Law Judge's dormancy conclusion regarding Barnes' general commodity authority, and requested further hearing. The Commission's Division 3, in December, 1973, approved the proposed merger transac-

[3] In September, 1972, appellant Old Dominion filed an application to acquire Star Transport Co., Inc., a carrier authorized to transport general commodities throughout portions of New Jersey, New York, Connecticut, Rhode Island, Massachusetts, and at Baltimore, Md., and Washington, D.C. That application was approved and the transaction has been consummated. The "Star" general commodity authority connects with the Barnes general commodity authority (the authority found dormant) at Baltimore, Md., thus permitting a through East-South general commodity operation.

tion but affirmed, without discussion, the Law Judge's dormancy finding with respect to the involved general commodity authority, and also found, without discussion, that Barnes' specific commodity authorities (including agricultural machinery), with the exception of lumber, flatboard, pulpboard, and other lumber related commodities, were "dormant for all practical purposes." It ordered the authorities found dormant to be cancelled and denied the request for further hearings. (App. D, *infra,* pp. 56a-64a)

In April, 1974, appellants petitioned the Commission for further hearing and, alternatively, for reconsideration on the present record, pointing out that neither its decision and order nor the Law Judge's initial decision indicated the standard by which the involved general commodity and agricultural machinery authorities were judged and found dormant, and that its dormancy finding with respect to the general commodity authority contradicted its prior decision involving that very same authority just two years before in Docket No. MC-F-9343, *Barnes Truck Line, Inc.—Purchase—Coker Freight Lines, Inc.* It was also pointed out that the Commission had failed to consider the operational effect of its action, had ignored the effect on the shipping public, as evidenced by numerous verified shipper statements submitted with the petition, and had failed to evaluate the effect of the proposed transaction on the one remaining protestant. Again, Division 3, acting as an appellate division, with one of the three Commissioners voting to reopen the proceeding for further hearing, denied plaintiffs' petition, concluding that even though vendor (Barnes) "showed some shipments under those portions of its authority that had been ordered cancelled, that number of shipments are insignificant and not of sufficient caliber to justify classifying the authority as active," that applicants had not submitted any evidence justifying reactivation of the dormant rights,[4] and that the petition raised "no new or material matters not adequately considered by the Division." (App. D, *infra,* pp. 70a-72a)

Appellants next sought a finding that this proceeding involved issues of general transportation importance, urging the same matter as set forth in its April, 1974, petition, and emphasizing the severe adverse effects the Commission's action would have upon Old Dominion's personnel, operational practices, and facilities. The Commission denied this petiton, although 4 of the 10 commissioners, going beyond the matter actually presented for consideration, voted to reopen the proceedings for further hearing.

The effect of the challenged orders is to find the backbone of Appellant Barnes' East-South general commodity authority "dormant" and require appellant Old Dominion, as a condition to its acquisition of Barnes, to cancel said authority, thereby eliminating a substantial general commodity operation that has been in existence for many years. Old Dominion will also be required to cancel Barnes' agricultural machinery authority, despite that carrier's many years of operation thereunder.

The suit before the District Court was instituted on January 10, 1975, at which time motion for a tempo-

[4] This conclusion, as will be shown later in this jurisdictional statement, totally ignored the fifty-three shipper affidavits submitted to the Commission with plaintiffs' petition for reconsideration as well as the hearing testimony of a witness from Long Manufacturing Company, Tarboro, N.C., concerning Barnes' agricultural machinery authority.

rary Restraining Order was also filed. Appellants asked in their complaint that the orders of the Commission entered December 19, 1973, and October 29, 1974, (as corrected by orders of November 21 and December 20, 1974) be enjoined, annulled and set aside. By order entered January 23, 1975, the Court issued a temporary restraining order pending hearing and decision on merits of the case. By Memorandum & Decision dated August 15, 1975, after quoting four paragraphs from the Commission's orders herein held that the Commission's action was "neither arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law, and that it is supported by substantial evidence," citing this Court's decision in *Bowman Transportation Inc.* v. *Arkansas-Best Freight System, Inc.*, 42 L. Ed. 447 (1974). (App. C, *infra,* pp. 9a-13a) By judgment entered September 8, 1975, the court dismissed the Complaint and dissolved the temporary restraining order. (App. E, *infra,* p. 82a-83a)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The need to resolve with greater finality the important provisions of Section 5 of the Interstate Commerce Act as involved here is underscored by the fact that the Interstate Commerce Commission is called upon to rule on between three and four hundred motor carrier merger or control applications filed under Section 5 of the Act each year. With minor exceptions the issue of "dormancy" or transferability is raised in all contested cases. Prior to the Commission's action in this proceeding and in *Wright Trucking, Inc.* v. *U. S., supra,* members of the motor carrier industry regulated by the Commission could reasonably make judgments with respect to whether a proposed transaction would be approved without burdensome condi-

tions in the light of the Commission's "substantiality" test as expressed in *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc.,* 75 M.C.C. 659 (1958), and countless later decisions embracing the "substantiality" doctrine. Since the Commission in this case has abruptly departed from the prevailing rule of decision, the definitive standards so sorely needed to guide industry members, the public and agency members [4a] become significantly less secure and the predictability of agency action in motor carrier merger cases uncertain at a time when economic predictability is so essential.

1. Commission's Failure To Adhere to Its Long-Established Dormancy Standard or Explain Its Departure Therefrom

The District Court ignored the fact that the Commission, in its decision and orders finding certain portions of Barnes' authority dormant, failed to apply established standards for determining transferability. Yet this Court has recognized the importance of standards to sound administrative and regulatory action, and has cautioned that any departure from established standards or policy must be adequately explained and accompanied by an announcement of the new policy. *Atchison, T. & S. F. R. Co.* v *Bd. of Trade,* 412 U.S. 800, 807-808 (1973).

[4a] Judge Friendly pointed out the Advantages of Standards to the agencies:

> "Finally, the clear definition of standards affords a miscellany of intra-agency advantages. Perhaps the most important is educating the agency members—much will be learned from the discussions among the members and with the staff that are essential to the framing of a policy, whether in a decision or in a statement or rule. It should reduce the volume of cases; absence of standards encourages the filing of applications which their presence would render hopeless." *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 863 (1962)

The statutory provisions governing the acquisition of one motor carrier by another is Section 5(2)(a) of the Act.[5] That section does not define or even mention "dormancy." However section 5 decisions reached by the Commission over the years has resulted in the development of a substantial body of decisional law governing the transfer of motor carrier rights This decisional law has been woven into the statute, and represents Commission determination of how best to fulfill its statutory mandate. *Atchison, T. & S. F. R. Co.* v. *Bd. of Trade, supra* at 807.

A paramount concern early expressed by the Commission in acquisition proceedings was whether the vendor carrier had actively conducted operations under the authority sought to be transferred, or whether it had effectively abandoned operations under said authority. *Transcon Lines—Purchase—Anderson Motor Service Co.*, 50 M.C.C. 749 (1948), *Sentle—Purchase—Great Lakes Motor Dispatch, Inc.*, 38 M.C.C. 445, 449-450 (1942). "Dormancy" occurs when there is "an abandonment or termination of services the reactivation of which will result in damages either to the public interest or to intervening or protesting carriers who conducted operations during the interruption of said services." *Arrow Transportation Co.* v. *United States*, 300 F. Supp. 813, 818 (1969) *Accord, Hall's Motor Transit—Control—Accelerated*, 104 M.C.C. 353 (1967), *New Divie Lines, Inc.—Control—Jocie Motor Lines*, supra. Or as the Commission has described it:

> "As a rule, we have withheld approval of transactions involving the disposition of operating

[5] 49 U.S.C. § 5(2)(a).

> rights on the basis of dormancy only where the evidence *clearly shows* that service to and from particular points or areas has been abandoned or discontinued for substantial periods of time." *Hall's Motor Transit—Control—Accelerated, supra* at 365 (emphasis added).

The "substantiality test" or standard was first enunciated in *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc., supra,* where the Commission stated:

> "An irregular-route carrier is only required to submit evidence showing that it has rendered substantial service to a representative number of points within its authorized territory in order to support the conclusion that its operations have been *substantial* and *continuous.*" (75 M.C.C. at 666, emphasis added)

In *Gillette Motor Transport, Inc.—Control—Voss*, 93 M.C.C. 265 (1963), the Commission, quoting from this Court's decision in *United States* v. *Carolina Freight Carriers, supra,* indicated that the "substantiality test"applied to commodities as well as points or territory served:

> "Accordingly we can find no justification or logic for limiting the test of substantiality of operations to a consideration of the points or territory served. Nevertheless, a showing could be made that the carrier operated as a common carrier of a large group of commodities or of a whole class or classes of property, even though it may not have transported all commodities falling within their generic classifications." (93 M.C.C. at 268-269)

The substantiality doctrine has been consistently adhered to over the years by the Commission,[6] and these

[6] Commission decisions adhering to the New Dixie "substantiality test" include, *inter alia, Ohio Fast Freight, Inc.—Control—Trumbull*, 109 M.C.C. 88 (1969); *Colonial Motor Freight Line—*

decisions indicate that application of this test requires consideration of:

> "... the nature of the rights involved, the size and resources of the carrier being tested, and the territory it is authorized to serve. We must consider whether regular- or irregular-route rights are involved, whether the commodity authorization is for general or specified commodities, and whether the operations performed by the selling carrier have been commensurate with its resources and abilities. In addition, where a carrier has been conducting active and continuous operations throughout its authorized territory, it is not compelled to submit evidence of service to and from all authorized points in its area of service or show that a regular and consistent movement of traffic has been made from such points in order to justify a conclusion that the operations performed, as a whole, have been of a substantial and continuous nature." *O'Donnell's Express—Purchase—Bill's City Transfer, Inc.*, 104 M.C.C. 161, 166 (1967).[7]

Mere numerical discrepancy or imbalance in the variety and type of traffic handled is not alone determinative of dormancy, and consideration must be given to other factors as well. *Colonial Motor Frt. Line—Purchase—Bruce Johnson Trucking*, 101 M.C.C. 770 (1967); *Hall's Motor Transit—Control—Accelerated* (and embraced cases), 104 M.C.C. 353 (1967); *Miami Transportation Company, Inc., of Ind. —Purchase—Strothman*, 97 M.C.C. 600 (1964); *Graf. Bros., Inc.—Purchase—Kervillo Motors Lines*, 104 M.C.C. 569, 571 (1968); *Carolina Freight Carriers Corporation—Purchase—Kilgo*, 93 M.C.C. 543 (1963); *Mushroom Transportation Company—Control —Smith & Howell*, 87 M.C.C. 584 (1961); *Central Wisconsin—Purchase—Carlstedt*, 85 M.C.C. 305 (1960); and *AAA Trucking Corporation—Purchase—Garford Trucking, Inc.*, 75 M.C.C. 640 (1958).

[7] See also, *Ohio Fast Freight, Inc.—Control—Trumbull*, 109 M.C.C. 88 (1969).

Pur.—Bruce Johnson Trucking, 101 M.C.C. 770, 775 (1967), *Miami Transp. Co., Inc. of Ind.—Pur.—Strothman*, 97 M.C.C. 600 (1964).

> "The test of substantiality enunciated by the *New Divie* case is not a yardstick whereby we can measure operations and say that less than "X" shipments daily or monthly equals dormancy. The test is elastic, some factors being whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of carriers involved in similar service, whether the financial and material capabilities of the carrier have been utilized as far as practicable. Thus the number of shipments held to amount to dormancy in one case will vary from that in another." *Miami Transp. Co., Inc., supra* at 608.

Despite the Commission's long adherance to- and consistent application of- its "substantiality" test as the standard for evaluating operating authority in Section 5 proceedings, examination of its decisions and orders here reveals that this standard was not used in evaluating an operation conducted under Barnes' general commodity or specific commodity authorities. Nor is there any indication that any of the numerous facts of record concerning those operations were evaluated in light of the various factors comprising the "substantiality test."[8] Moreover, the actual standard used (if any) to evaluate these several authorities is not disclosed, and the statement in the Commission's October 29, 1974, order that "the number of shipments are insignificant and are not of sufficient caliber to justify classifying the authority as active" is merely a conclusion, not an explanation of or rational for its deci-

[8] Indeed, none of the Commission's decisions and orders involved here even mention this "substantiality" standard.

sion. This cryptic statement hardly constitutes an announcement of a new standard for determining dormancy.

In several decisions rendered since the decisions and orders here the Commission has adhered to the "substantiality test" in evaluating the operating authorities sought to be transferred, indicating that it had no intention of abandoning that standard by its decision and orders here. These recent decisions reaffirm its previous holdings that the "substantiality test" must be applied to the record facts in each case. See *Tower Lines, Inc.—Control and Merger,* 116 M.C.C. 731, 736 (1974), *Overnite Transportation Company—Purchase —Tidewater Express,* 116 M.C.C. 539, 543 (1974), and *Laidlaw Transport—Purchase—Hennis,* 116 M.C.C. 781 (1974).

Two things are clear. First, the "substantiality test" has been consistently applied in past and subsequent decisions whenever the Commission has had to measure the past activity of operating authority sought to be transferred in Section 5 proceedings, and, second, the Commission did not apply that standard to the record facts detailing Barnes' operations under its general commodity and agricultural machinery authorities.

Where an administrative agency adheres to a particular standard or policy for an extended period of time, there is a presumption that such standard or policy is the best method by which the agency can effectively perform its statutory functions and comply with its congressional mandate. See *Atchison, T. & S. F. R. Co.* v. *Bd. of Trade, supra.* The Court stated in that decision, which, like the instant proceeding, involved orders of the Commission:

> "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms." (412 U.S. at 807-808)

While recognizing an agency's need to change its policies and requirements from time to time in response to changing industry needs and conditions, the Court cautioned that departures from long adhered to standards or policies must be accompanied by an announcement of the new policy and, more importantly, an explanation as to why the agency has departed from its previous standard. *Atchison, T. & S. F. R Co.* v. *The Board of Trade, supra* at 808.

As shown, the Commission has for many years adhered to and applied its "substantiality test" as the standard for measuring the viability of operating rights in Section 5 proceedings. That standard is presumptively proper for use in enabling the Commission to fulfill its congressional mandate in ultimately determining whether the transaction is "consistent with the public interest."[9] (412 U.S. at 808) Appellants and other carrier's have come to rely upon this standard, as has the Commission, yet it failed to apply the prevailing standard in measuring Barnes' transaction activities under the authorities here in issue.[10]

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[9] 49 U.S.C. § 5(2)(b).

[10] The Commission's failure here is made even more manifest when one compares the Commission's factual findings with its ultimate conclusions. The initial decision described in detail Barnes transportation activities, the number and variety of commodities handled and the number of shippers and points served. It is difficult to understand how this detailed description of Barnes transportation activities can constitute evidence which "clearly shows" that Barnes has "abandoned or discontinued" its operation.

Clearly, the Commission's failure to apply its traditional dormancy standard to the facts here or set forth any reasons not adhering to said standard renders its action arbitrary and capricious, and without rational basis, in violation of the Administratve Procedure Act. (5 U.S.C. § 557 and 706)

2. There Is a Conflict Between District Courts as to the Proper Commission Standard for Determining Dormancy

The District Court below simply affirmed the Commission's decision and orders without comment on or discussion of the issues raised by appellants, thereby tacitly approving the Commision's dormancy determinations *without* application of its traditional "substantiality test." Its decision in this regard is completely contrary to the decision of the United States District Court for the District of Massachusetts in *Wright Trucking, Inc.* v. *United States,* C.A. No. 73-1445-C, dated April 3, 1975, wherein that Court specifically recognized the "substantiality test" as the Commission's standards for determining dormancy. The District Court stated in its decision:

> "The Commission's stated test for dormancy when considering irregular-route carriers like Bonded is whether
>
> > 'it has rendered substantial service within its authorized territory in order to support the conclusion that its operations have been substantial and continuous.'
>
> "But the Commission has elsewhere said that evaluation of whether a given amount of shipments are substantial requires consideration of such factors as 'whether the rights involve general or specified commodities, the character of the area served in terms of industry and population, the number of

> carriers involved in similar service, whether the rights are radial or non-radial, and whether the financial and material capabilities of the carrier have been utilized as far as practicable.'
>
> *Miami Transportation Co., supra* at 608."

After review of these factors, the District Court concluded:

> "Here there has been no interpretative statement by the Commission explaining how, taking into account these factors, Bonded's operations were insubstantial. The only discussion at all is that of Review Board No. 5, which is at best conclusory and at worst fatally flawed by reliance upon an absence of evidence which the Commission later permitted applicants to cure. After this supplementary evidence was accepted, the Commission's Division 3, acting as an Appellate Division, purported to consider *de novo* the merits of the application. The opinion explaining its Order—which because of its *de novo* character should perhaps be regarded as the operant administrative decision for purposes of this action—recited only that Division 3 was "in general agreement with the conclusions reached regarding the issue of dormancy in the report and order of Review Board Number. . . ." It may be, of course, that both Commission decisions were fully justified. However, without some reasoned evaluation of Bonded's shipping data, we are at a loss adequately to understand either."

The District Court in the *Wright* decision expressly recognized and required application of the Commission's "substantiality test" in determining whether the operating authority sought to be transferred was dormant. The decision of the District Court here, on the other hand, clearly suggests that the Commission need

not apply its "substantiality" test in determining whether a particular operating authority is dormant. A conflict exists, whereby one District Court has required either Commission adherence to its long-established standard or an explanation of its reasons for departing from said standard, as did this Court in its *Atchison, T. & S. F. Co., supra* decision, while the District Court below required neither Commission adherence to said standards or any explanation for its departure therefrom.

The effect of this conflict is to remove the element of certainty and consistency that formerly existed in the Commission's determination of "dormancy" under Section 5 of the Act, and introduce in its place doubt and confusion. Such circumstances is anathema to the expressed need for stability and predictability of administrative action.

3. The Disparate Consequences Produced by the Commission's Abandonment of Its Dormancy Standard Is Further Demonstrated by Its Prior Findings Involving This Very Same Authority.

The arbitrary and capricious nature of the Commission's action here in abandoning its "substantiality" standard, together with the legal uncertainty created by such action, is further demonstrated by the fact that the Commission, in a proceeding decided just two years before Barnes contracted to sell its stock to Old Dominion, *did apply* its "substantiality test" to operations conducted by Coker Freight Lines in *Barnes Truck Line, Inc.—Purchase—Coker Freight Line, Inc.,* Docket No. MC-F-9343, the proceeding wherein Barnes acquired the general commodity authority involved here. Although Coker's operations were considerably less extensive than those conducted

by Barnes (both as to number of shipments and variety of commodities handled) under the very same authority, the Commission, after considering protestants dormancy claims *and applying the "substantiality test" to Coker's evidence,* found that Coker's general commodity authority was not dormant and could therefore be transferred to Barnes.[11]

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[11] In *Barnes—Purchase—Coker* the findings of the Administrative Law Judge were adopted by the Commission. His most relevant findings were:

> Vendor has been engaging in motor carrier operations under its present management since about September of 1961. The schedules of operations submitted by vendor demonstrate that, with certain exceptions, it has been substantially exercising its authority as an irregular route common carrier of general commodities. Specifically, sufficient activity has been shown between the authorized portion of North Carolina, on the one hand, and, on the other, the eastern part of Virginia, Baltimore and the described area of Pennsylvania, including Philadelphia. Despite the fact that almost all of the traffic has involved shipments of truckload quantities, that not all points in the said portions of the authorized territory have been served and that in some areas commodities carried have been limited to one or a few types of products, no dormancy exists therein of a kind which would prevent a transfer of these rights. Although there have been no shipments southbound from points in Virginia to North Carolina, there is adequate movement in the reverse direction of military freight, doors, pulpwood, paper, foodstuffs and other items. Limitation of this authority to one-way transportation would create an unsound and uneconomic basis upon which to operate. Sufficient operations are shown in both directions between Baltimore and North Carolina. Finally, appropriate activity exists in operations between North Carolina and the Philadelphia area, although movements of doors, paper, whiskey, roofing and floor coverings seem to predominate. In each of these instances, the past operations meet the test of "substantiality," in that it has been shown that a substantial number of points have been served in the hauling of a reasonable variety of merchandise. See *Cooper Motor Lines,Inc.—Purchase (portion)—Laney Tank Lines, Inc.,* 101 M.C.C. 586, 590. Consideration has been given, in so concluding, to the vendor's size and capacity, and to the nature of the authority held.

Following purchase of this authority, Barnes utilized it much more extensively than did Coker, transporting both a greater volume and variety of traffic. It is difficult to fathom how the Commission could in 1967 find said authority not to be dormant, and yet just two years later, purporting to evaluate this very same authority based on more extensive operations, find it to be dormant. The only apparent explanation for these wholly inconsistent results is the fact that the Commission here *did not* evaluate Barnes' operations in light of the "substantiality test."

These facts, in addition to illustrating the legal uncertainty resulting from the Commission's action here, further demonstrate the arbitrary and capricious nature of the Commission action and its lack of any rational basis.

4. The Required Cancellation of Nearly All of the Involved General Commodity Rights Constitutes an Atomization of Operating Authority of the Kind Proscribed by This Court

A. SUPREME COURT DECISION

Appellees admit that Barnes handled numerous shipments of commodities other than iron and steel articles southbound and lumber and related items northbound under the involved general commodity authority.[12] The Commission completely ignored this traffic in its action here. Instead, it seized upon the fact that Barnes transported a preponderance of iron and steel articles shipments southbound and lumber and related items shipments northbound, and limited the authority authorized to be transferred to the more numerous com-

[12] Brief to District Court of Appellee Colonial Motor Freight Line, pp. 26-29; Joint Brief to District Court of Appellees Interstate Commerce Commission and United States, Vol. II, pp. 51-55.

modities and required cancellation of all remaining authority. Such action is a classic example of a kind of "atomization" of operating authority condemned by this Court in *United States* v. *Carolina F. Carriers Corp., supra.*

That decision arose out of an early "grandfather" application proceeding under Section 206 of the Act, where the Commission attempted to limit the commodity authorization in an applicant's certificate to those "commodities which had been carried in substantial amounts and with a degree of regularity,"[13] rather than the general commodity authorization sought. This Court held that where an applicant carrier had transported a wide variety of general commodities the Commission could not restrict the commodity authorization "to those which he carried with more frequency and in greater quantities than others"[14] (Citations omitted), and it went on to state:

> "The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in "bona fide operation" as a "common carrier" of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such a undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. Yet viewed as a whole rather than as a group of separate and unrelated items, his prior activities may satisfy the test of "bona fide operation" as a "common carrier"

[13] 315 U.S. at 482-483.

[14] 315 U.S. at 483.

within the scope of his holding out." (315 U.S. at 483-484)

The Court also recognized the effect of such limitation on carrier's operations, stating:

> "To appellee such matters involve life or death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall." (315 U.S. at 488)

B. COMMISSION DECISIONS

Following the teaching of the *Carolina Freight Carrier* decision, the Commission has over the years regularly rejected contentions in acquisition proceedings that a vendor carrier's general commodity authority be limited upon transfer to those commodities it actually transported or those it transported in substantial numbers. The Commission has repeatedly stated that its policy against "atomization" or "pulverization" prevents such limitation or restriction of commodity descriptions.

In *Watkins Motor Lines, Inc.—Control and Merger,* 90 M.C.C. 567, 584 (1962), the Commission stated in response to an opposing carrier's request that certain commodities be excluded:

> "In connection with the myriad of commodities capable of being transported under the generic description of general commodities, were we to attempt, in a proceeding under Section 5, to cancel those commodities which a carrier had not transported, or had not handled in sufficient quantities to be considered a competitive threat by any particular carrier, we would be faced with an insurmountable task, and the resulting certificates acquired by purchasing carriers would eventually become mere commodity lists. We have, on numerous occasions in the past, refused to pulverize a certificate by canceling individual commodities therefrom, except under unusual circumstances, which do not exist here. A conclusion that portions of the rights are dormant cannot be reached on the record before us. In view of the foregoing findings and conclusions, the petition of Georgia Highway for further hearing in No. MC-F-7225 will be denied."

And in rejecting a similar request made in *Jones Motor Co., Inc.—Control—Mundy Motor Lines,* 90 M.C.C. 899, 908 (1963), the Commission described the evidence necessary for a general commodity showing:

> "All that is necessary is a showing that the carrier provided service on a substantial number of commodities to a representative number of points within its authorized territory in order to support the conclusion that operations as a general-commodity carrier have been substantial and continuous."

These decisions have been regularly followed by the Commission. See *Gateway Transp. Co.—Control—Tamiami Freightways,* 90 M.C.C. 899 (1963), *Red Arrow Frt. Lines, Inc.—Purchase—Galveston,* 104 M.C.C. 820 (1968), *Gordons Transports, Inc., Pur.—Hayes Freight Lines,* 90 M.C.C. 351. In *Gateway Transp.,* case, *supra,* the Commission recognized the mamouth problem inherent in any attempt to limit operating rights sought to be transferred to those commodities which had actually been transported thereunder:

> "In the same connection, were we to undertake cancellation of the right to transport the host of commodities which any duly authorized general commodity carrier, similarly situated as Freightways, may but does not transport, we would be faced with an insurmountable task of rewriting

untold numbers of motor carrier certificates which would become mere commodity lists. See *Watkins Motor Lines, Inc.—Control and Merger,* 90 M.C.C. 567, 584, hereinafter called the Watkins case. We recognize that in the motor carrier industry there are numerous carriers who concentrate on a few types of commodities that are included in the generic term "general commodities" although they possess authority to transport general commodities, with the usual exceptions. Were the Commission to adopt a policy favoring the pulverization and delimitation of certificates embodying operating rights of the latter description to just those commodities transported, the undesirable result discussed in the *Watkins* case would ensue." (97 M.C.C. at 513)

C. COMMISSION DECISION HERE IS CONTRARY TO SUPREME COURT DECISION AND ITS OWN ESTABLISHED PRECEDENT

Despite the clear admonition of this Court against "atomization" of motor carrier operating authority, as well as the numerous Commission decisions giving effect to that admonition, the Commission here has ignored that policy and has limited the authority authorized to be transferred to the most numerous commodities transported.

A brief review of the transportation activities of Barnes under its general commodity authority—activities which are not disputed by the parties—reveal a pattern of operation that fits squarely within factual mold and policy of the above decisions:

(1) Barnes transported some 111 different commodities under this authority, ranging from asphalt shingles, paper and burlap bags, glass bottles and liquors to chemicals and fertilizers, motor oil, varnish and paint, and concrete slabs;

(2) It operated regularly and continuously under this authority, annually transporting in the

neighborhood of 8,000 to 10,000 shipments weighing over 400 million pounds;

(3) Continued to hold itself out to transport any and all commodities tendered to it, possessing both van and flatbed equipment to provide this service.

Facts such as these have, in prior proceedings, been more than sufficient to justify Commission rejection of contentions that general commodity authority should be limited to the commodities actually transported. See *Branch Motor Express Co.—Control—Morgan Trucking Co., Inc.,* 93 M.C.C. 244, 259 (1963).[15] The Commission's failure to examine all facts of record here in terms of its long-established decisional policy against atomization of operating authority is arbitrary and capricious, and its ordered cancellation of Barnes' general commodity authority is wholly contrary to this Court's decision in *Carolina Freight Carriers, supra.*

5. Despite Statutory Requirements, There Has Been No Consideration Given to the Effect of the Commission's Action on Carrier Employees, on Old Dominion's System Operations, or the Shipping Public.

A. CARRIER EMPLOYEES

Section 5(2)(c) of the Act requires the Commission in "passing upon" transactions proposed under Section 5 to "give weight" to, *inter alia,* "(4) the interest

[15] In that case, the Commission listed the commodities transported by the vendor carrier, concluding that such a commodity mix constituted general commodities. Those commodities included shoe fittings, soap, textiles, printed matter, steel alloy, electric equipment parts, paper articles, nails, food, glassware, oil, furniture, containers, aluminum ingots, sand, floor covering, paperboard, machinery, plastics, iron and steel, brass and bronze and furnaces, and were not as varied as the commodity mix handled by Barnes under the involved authority. The Commission's conclusions in the two proceedings are in direct conflict.

of the carrier employees affected."[16] The Commission has stated that it must, under this provision—

> ". . . determine only that the employees involved have been or will be adversely affected and then provide for an equitable balance between the interests of the carrier or carriers involved, their employees, and the public;" *Midwest Buslines, Inc.—Pur.—American Bus Lines, Inc.*, 90 M.C.C. 175, 184 (1962)

See also *United Transp. Co. of Rhode Island—Pur.—McCormick*, 90 M.C.C. 201, 205 (1962), *Watkins Motor Lines, Inc.—Control and Merger, supra* at 575, *Short Line, Inc.—Purchase—New England*, 75 M.C.C. 33, 37 (1958).

In addition to this specific provision requiring employee consideration, Section 5, which requires consideration of all aspects of the transaction as they affect the public interest, "includes the effect on employees." *Midwest Buslines, Inc.*, 97 M.C.C. 426, 440 (1964). Such consideration, therefore, is a material issue in every acquisition proceeding. The Commission has made it clear, moreover, that it is the factual circumstance that exists or would exist at consummation that must be considered in connection with the employees' interest, not the situation existing at the time of hearing. *Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.*, 75 M.C.C. 147 (1958).

> "The provisions of Section 5(2)(c)(4) should not be rendered ineffective by the subsequent creation, prior to consummation, of a situation which was contrary to the intent as expressed in the record and which provided, in part, the basis for our authorization of the transaction." (75 M.C.C. at 151)

[16] 49 U.S.C. § 5(2)(c)(4).

Despite this statutory requirement, as well as the substantial alteration in operation resulting from the Commission's dormancy finds, the *only* reference to carrer employees is in the December 19, 1973, order, where it concludes "that carrier employees will not be adversely affected." There is no discussion of this matter, and no indication as to what fact or facts, if any, the Commission relied upon in reaching its conclusion. Certainly there is no explication of "the reasons or basis" for that finding, as required by Section 557(c) of the Administrative Procedure Act.

The testimony at hearing on this matter dealt with the Old Dominion-Barnes operations as conducted under temporary authority, yet it is clear from the context of the Commission's conclusion in the December 19 order that the "employees" finding applies to the transaction as approved. In view of numerous operations conducted by Barnes under both the involved general commodity and agricultural machinery authorities, there is no rational connection between the Commission's cancellation requirement and its conclusion that the transaction would not adversely affect employees. And there is no factual support in the record for that conclusion.

The Commission's dormancy findings struck the very heart of the Barnes operating authority, i.e. its general commodity authority between Baltimore and southeastern Pennsylvania points, on the one hand, and North Carolina points on the other. The importance of this segment of authority to Old Dominion's system operations is described in the record and all of the relevant facts were available to the Commission. Modification of the Barnes authority by virtue of the dormancy finding makes the transaction a whole new ballgame,

and will require a severe contraction in Old Dominion-Barnes' operations by effectively precluding the long-haul, east-south general commodity movement formerly conducted by Barnes and jointly conducted by Old Dominion and Barnes for nearly 6 years. Facts presented to the Commission indicate that elimination of this crucial connecting authority will result in the dismissal of a substantial number of employees.[17]

Despite this obvious consequence of the Commission's orders here, there is no indication that any consideration was given to its effect on employees. Reasoned consideration cannot be presumed from the Commission's conclusion, especially when available facts support a contrary result. To permit this conclusion to stand, without any indication, explanation, or rationale as to how it was arrived at or what fact or facts were relied upon, would be to invest or accord the Commission the kind of unbounded expertise condemned by this Court in *Baltimore & O. R. Co.* v. *Aberdeen R. R. Co.*, 393 U.S. 87, 91-92 (1968).

B. ESSENTIAL FACTORS TO BE CONSIDERED IN CONCLUDING THAT TRANSACTION IS "CONSISTENT WITH THE PUBLIC INTEREST"

(1) Statutory Provision

The Act makes it lawful for one carrier to acquire control of any other carrier if the Commission finds the transaction to be "consistent with the public interest."[18] The expression "public interest" requires consideration of a number of factors, including those directly related to the adequacy of our transportation

[17] It is estimated that over 100 employees will be laid off as a result of the Commission's order requiring cancellation of virtually all of Barnes' east-south general commodity authority.

[18] 49 U.S.C. § 5(2)(b).

system, its essential conditions of economy and efficiency, the appropriate provision for, and best use of, transportation facilities, and also encompasses consideration of the interests of competing carriers, together with the advantages and disadvantages to the public. *Mushroom Transp. Co., Inc.—Control—Smith & Howell Film, supra, Matlack Inc.—Control—Southern and T. I. McCormick,* 109 M.C.C. 861 (1971).

The Commission's December 19, 1973, order makes the statutory finding that the transaction, as approved, will be "consistent with the public interest." Beyond that mere recital, there is no discussion in either that decision and order, the Administrative Law Judge's initial decision,[19] or any of the subsequent Commission orders concerning those various public interest factors, and no subsidiary findings are made to support its "public interest" conclusion.

The decisions and orders here attempt to circumvent the clear requirement of the Administrative Procedure Act[20] that "[a]ll decisions" of administrative agencies" shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, of discretion presented on the record . . ."[21] Determination that a proposed trans-

[19] Although the Law Judge recited various "public interest" factors to be considered, there is no discussion of these factors in terms of the facts of record here. (App. D, *infra*, pp. 52a-54a).

[20] 5 U.S.C. § 557(c).

[21] These several decisions and orders contain no findings with respect to (1) the termination of the long-standing Old Dominion-Barnes general commodity operation upon the adequacy of transportation in the involved areas, (2) its effect on Old Dominion's system operations, particularly with regard to its ability to continue providing economical and efficient transportation, (3) any provision for the maximum use of transportation facilities, or (4) the advantages and disadvantages to the public. (App. D, *infra*, pp. 51a-81a).

action is "consistent with the public interest" is a question of law, and requires clear explication of the basis for such a finding.

(2) Adequacy of Transportation and Public Benefit

The Commission's cancellation orders here will produce only negative consequences, with no corresponding public benefit or improvement to the transportation system.[22] It gave no consideration to the effect of its action on the adequacy of transportation in the affected area or on the shipping public, and it ignored the operations conducted by Old Dominion-Barnes during the period of temporary authority as well as the supporting shippers affidavits expressing a need for continuation of this service.

a. Operations Conducted Under Temporary Authority

Old Dominion has managed Barnes under temporary authority for over six years. Although appellants requested the Commission to give consideration to the operations conducted by Old Dominion and Barnes during this period under both the general commodity and agricultural machinery authorities, the Commission refused to do so. Nowhere in its reports or orders does the Commission articulate any reasons for this refusal, despite the fact that it has historically given consideration to such evidence, particularly with regard to the impact of such operations on protestant

[22] The only case cited by the District Court below, *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* presents an interesting paradox insofar as this case is concerned. The policy enunciated in the *Bowman* decision is one of favoring and encouraging competition, whereas the effect of the Commission's orders here, and the District Court's affirmness thereof, will be to reduce and eliminate competition. That decision, therefore, can hardly serve as precedent for the Commission action here.

carriers.[23] Those cases require the Commission to make findings with respect to the impact of temporary authority operations upon applicants, protestants, and

[23] In *Bowman Transp. Inc.—Control and Merger,* 93 M.C.C. 133 (1963), the Commission stated at pages 139-140:

> We have considered operations conducted under temporary authority with other evidence in determining whether a transaction would be consistent with the public interest, particularly when such operations are of long standing and afford a means of ascertaining whether the service thereunder has had destructive effect on the operations of other established carriers. See *Ashworth Transfer, Inc.—Pur.—Willcoxon and Fawkes,* 90 M.C.C. 107. As indicated, protestants contend that the proposed unification would place them in a position where they may be materially harmed through a diversion to Bowman of their present and future traffic. The attached appendix reflecting the gross revenues, net operating revenues, net income before income taxes, operating ratios, and tonnage of the six exceptants for 1958, 1959, 1960, and 1961 shows a contrary result. Each of the six exceptants realized its largest gross revenues and tonnage in 1961, after Bowman had already operated the Hawkins' rights for a year. Four also realized their largest net income, before taxes, in 1961. Furthermore, of the 10 other protestants, in 1961, 8 thereof, enjoyed their largest gross revenues, and 6 their largest net income, before taxes.
>
> Considering the extent to which the Hawkins operations have been rehabilitated under the temporary authority, and the expressed need of the supporting shippers for the continuance of Bowman's improved service under the unified operation, the conclusion is warranted that substantial compensatory benefits have resulted to the shipping and receiving public served by it, without, so far as this record shows, any serious adverse effect on the operations and services of the protestant carriers. They are all strong, aggressive, and firmly established in the involved territory within which each operates, and, in our opinion, are well able to successfully meet any intensified competition which may result from the instant transaction so long as they maintain a high level of service to which the public is entitled. Compare *Briggs Transp. Co.—Control and Merger,* 70 M.C.C. 745, and *Quinn Freight Lines, Inc.—Control and Merger,* 85 M.C.C. 271.

the public, yet the Commission here gave no such consideration, despite the availability of such information, to the Old Dominion-Barnes' temporary authority operations.

b. Shipper Affidavits

Although appellants sought to present additional facts demonstrating the public's need for continuation of Barnes full general commodity and agricultural machinery operations, this testimony was ignored. Affidavits of fifty-three shippers were submitted to the Commission, spelling out shippers' use of Old Dominion-Barnes' general commodity service, the continued need for retention of this service, and, in several instances, the fact that this service was the only general commodity service utilized.[24]

There is no indication in any of the orders that the Commission gave any consideration whatsoever to these affidavits, and, more important, the orders fail to set forth any reasons for not considering these affidavits. These affidavits demonstrate the public advantages to be derived from Old Dominion-Barnes' retention of the authorities here at issue, certainly a major consideration in determining whether a particular transaction is consistent with the public interest. Contrary to its action here, the Commission has in other proceedings considered affidavits similar to those tendered here, and has even justified reactivation of dormant authority upon such evidence. *Yellow Freight System —Pur.—Norwalk Truck Lines,* 109 M.C C. 672 (1971.[25]

[24] An affidavit was also submitted demonstrating the continued need for Barnes' agricultural machinery authorities.

[25] In that proceeding, forty shipper affidavits supporting the transfer and showing a continued need for service were submitted

(3) Effect of Dormancy Findings on Efficient and Economical Operations

Another factor embraced in the expression "public interest" is the effect of the approved transaction upon the acquiring carrier's ability to operate efficiently and economically. The Commission's mandate to promote economical and efficient transportation is contained in the National Transportation Policy.[26] This factor requires determination of (1) whether the vendor carrier's operations are competitive with those of the vendee carrier, (2) the use that will be made of the vendor carrier, and (3) whether the acquisition and/or merger will result in a more efficient and economical operation, the benefits of which will accrue to the shipping public.

Again, the Commission's decisions and orders here reveal no consideration of these matters. (App. D, *infra,* pp. 51a-81a) Old Dominion's main purpose in acquiring Barnes' general commodity authorities is to connect with its existing general commodity authority thus enabling it to provide a general commodity operation between Baltimore and southeastern Pennsylvania points on the north, and Carolina and Georgia

with applicant's petition for reconsideration. The Commission commented regarding these statements:

> "These shippers reflect a broad spectrum of general commodities, such as liquors, paper converters, leather goods, and printing machines. It is apparent from a review of these statements that Yellow is actively building up the Noroh authority, performing reasonable efficient single-line service, and otherwise is fulfilling public need for continued service. This need is further borne out by the fact that during the first 6 months of 1970, Yellow handled 11,162 shipments to and from points on route 54, which was almost triple the number handled by Noroh for the entire year in 1968." (109 M.C.C. at 675)

[26] 49 U.S.C. preceding §§ 1, 301, 901, and 1001. (Appendix A, p. 1a)

points on the south. These two sets of operating authorities complement one another, and there is a high degree of operational compatibility between the two carriers, so that a more efficient and economical operation would result from the proposed transaction. This efficient and economical operation has existed for nearly 6 years, and has benefitted shippers without harming any competing motor carrier, including appellee Colonial.

Not only will the action here deprive shippers of a more efficient single-line transportation service, but it will make the Old Dominion-Barnes' operation less efficient and economical, contrary to the public interest.[27] Certain equipment will be partially or fully idled due to curtailment of operation, and Barnes' new terminal facility at Baltimore will be reduced to partial utilization. The Commission here has totally ignored its responsibility to promote economical and efficient operation, has supplied no explanation or reason for its failure to do so, and has rendered a decision which is clearly arbitrary and capricious and not supported by substantial evidence.

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[27] The resulting inefficiencies and diseconomies are even greater as a result of Old Dominion's acquisition of Star Transport Co. Old Dominion now has substantial general commodity authority in several states north of Baltimore, as well as throughout the Carolinas and Georgia, and the involved general commodity authority is intended to be the connecting link. While the inefficient and uneconomical operations resulting from the denial of this connecting general commodity authority is apparent, the Commission gave no consideration whatsoever to this factor.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

FRANCIS W. MCINERNY
RICHARD A. MEHLEY
1000 - 16th Street, N.W.
Washington, D.C. 20036

Attorneys for Appellants

Of Counsel:

MACDONALD & MCINERNY
1000 - 16th Street, N.W.
Washington, D.C. 20036

APPENDIX

APPENDIX A

STATUTES INVOLVED

A. Interstate Commerce Commission

(1) National Transportation Policy, 49 U.S.C., preceding §§ 1, 301, 901, and 1001,

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competition practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

(2) Section 5(2)(a), 49 U.S.C. § 5(2)(a),

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part

thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(3) Section 5(2)(b), 49 U.S.C. § 5(2)(b),

Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such

terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (b) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(4) Section 5(2)(c), 49 U.S.C. § 5(2)(c),

In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(5) Section 210a(b), 49 U.S.C. § 310a(b),

Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate

the properties of one or more motor carriers, the Commission may, in its discretion, and without hearing or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carriers properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

B. Administrative Procedure Act

(1) Section 557, 5 U.S.C. § 557,

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedngs unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of

the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions inoperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(2) Section 706, 5 U.S.C. § 706,

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and account shall be taken of the rule of prejudicial error.

APPENDIX B

[Filed Sept. 25, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil No. C-75-14-G

OLD DOMINION FREIGHT LINE, INC.,

and

BARNES TRUCK LINE, INC.,
Plaintiffs

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants

and

COLONIAL MOTOR FREIGHT LINE, INC.,
and WILSON TRUCKING CORPORATION,
Intervenor-Defendants,

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Old Dominion Freight Line, Inc., and Barnes Truck Line, Inc., the plaintiffs named above, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered in this action on September 8, 1975, affirming orders of the Interstate Commerce Commission, dated December 19, 1973, and October 29, 1974 (as corrected by orders of November 21 and December 20, 1974), in Docket No. MC-F-10522, *Old Dominion Freight Line—Control—Barnes Truck Line, Inc.*, and dismissing this action.

This appeal is taken pursuant to 28 U.S.C. §§ 1253, 2101(b).

Dated this 25th day of September, 1975.

/s/ Larry B. Sitton
Beverly C. Moore
Larry B. Sitton
Seventh Floor Jefferson Standard Bldg.
Greensboro, N.C. 27402

/s/ Francis W. McInerny
Francis W. McInerny
Richard A. Mehley
1000 - 16th Street, N.W.
Washington, D.C. 20036

[Certificate of Service omitted in printing]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil No. C-75-14-G

Old Dominion Freight Line, Inc.,

and

Barnes Truck Line, Inc.,
Plaintiffs

v.

United States of America and
Interstate Commerce Commission,
Defendants

and

Colonial Motor Freight Line, Inc.,
Intervenor-Defendant

Three-Judge Court

Heard July 29, 1975 Decided August 15, 1975

Before Craven, Circuit Judge, and Gordon and Ward, District Judges.

Beverly C. Moore, Greensboro, North Carolina; Francis W. McInerny and Richard A. Mehley, Washington, D. C., for Plaintiffs; Thomas E. Kauper, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington, D. C., N. Carlton Tilley, Jr., United States Attorney, Greensboro, North Carolina, for Defendant United States of America; Fritz R. Kahn, General Counsel, and James T. Proctor, Attorney, Interstate Commerce Commission, Washington, D. C., for Defendant In-

terstate Commerce Commission; and A. W. Flynn, Jr., Greensboro, North Carolina, and Edward G. Villalon, Washington, D. C., for Intervening Defendant, Colonial Motor Freight Line, Inc.

Memorandum of Decision and Judgment

This is a suit brought by Old Dominion Freight Line, Inc. (Old Dominion), and Barnes Truck Line, Inc. (Barnes), before a three-judge court to enjoin, set aside, and annul orders of the Interstate Commerce Commission (ICC) which, while granting Old Dominion authority to acquire control of Barnes through acquisition of its capital stock, made the acquisition conditional on the cancellation of portions of Barnes' general commodity authority and special commodity authority, which the ICC found to be dormant. When Old Dominion assumed control of Barnes pursuant to temporary authority granted by the ICC on July 28, 1969, Barnes held ICC authority (1) to transport general commodities over irregular routes between points in North Carolina and Virginia, on the one hand, and points in Virginia, Maryland (including Baltimore), and Pennsylvania (including Philadelphia), and (2) to transport certain specific commodities over irregular routes from points in North and South Carolina to a number of states.

The Administrative Law Judge, in an order dated June 30, 1972, ruled that a portion of Barnes' general commodity authority was dormant. This ruling was modified by the ICC Appellate Division 3 on December 19, 1973:

> *It further appearing,* That the Administrative Law Judge found at page 27 of his report that Barnes' general commodity rights were dormant but for three exceptions, (1) between the Richmond-Petersburg area in Virginia, on the one hand, and, on the other, points in North and South Carolina, (2) within a portion of

> the State of Virginia designated the "contested" area in the Administrative Law Judge's report and (3) as limited to the transportation of specified commodities, principally iron and steel and iron and steel articles from Barnes' described territory in southeastern Pennsylvania and Baltimore, and lumber, flakeboard, pulpboard sheets and boards, from North and South Carolina to authorized points described in the appendix hereto; that the use of the term "contested" area in (2) above apparently was an inadvertant [sic] error since very little service thereto was performed by Barnes, and the said report should be modified to read the "uncontested" area of Virginia;
>
> • • • •
>
> *It further appearing,* That the report and recommended order of the Administrative Law Judge did not deal with the specified commodity authority of Barnes sought to be controlled by Old Dominion; that the evidence of record, particularly applicants' shipping abstracts at Exhibits 71-72 show that approximately 500 shipments carried in the period December 1968 through May 1969, under special commodity authority, virtually all consisted of lumber and related products, so that Barnes' specified commodity authority was dormant for all practical purposes except for the transportation of lumber, flakeboard, pulpboard and other lumber-related commodities from North and South Carolina and the "uncontested" area of Virginia, a situation consonant with the use of Barnes' general commodity authority based in the Carolina [sic], which was also used largely for transporting lumber-related commodities; that no shipper testimony was presented to justify reactivation of the dormant rights, and that, accordingly, Barnes' specified commodity rights to be transferred should be limited to lumber and related products, . . .

Division 3 concluded:

> *We find,* That, except as indicated above, the evidence considered in the light of applicant's pleading and replies thereto does not warrant a result different from that reached by the Administrative Law Judge; that the statement of facts, the conclusions and findings of the Administrative Law Judge, being proper and correct in all material respects, except as set forth above, should be, and they are hereby, affirmed and adopted as our own . . .

The December 19, 1973, decision was modified by various corrected orders, and the following modification was issued by Appellate Division 3 on December 20, 1974:

> *It appearing,* That the applicants allege that the Division erred in finding large portions of the vendor's authority to be dormant; that, in addition, through an inadvertent error, the decision and order deleted the general commodity authority of vendor from Wilmington, N.C., to Smithfield, N.C., and described the Virginia destination area of the vendor's general commodity authority between Wilson, N.C., and points in Virginia as points in Virginia south of a prescribed line; that the decision and order should be modified (1) to include in the authority to be retained by Barnes Truck Lines, Inc., and acquired by Old Dominion Freight Lines, Inc., the authority from Wilmington, N.C., to Smithfield, N.C., and (2) to redescribe the description of the said Virginia destination area under general commodity authority as follows:
>
> "and that points in Virginia on and south of a line drawn from Danville over U.S. Highway 360 to Richmond and thence over U.S. Highway 60 to Norfolk."

Plaintiffs contest the finding of dormancy with regard to portions of Barnes' general and special commodity authority, contending that the ICC improperly applied the law to the facts of this case, and request that this Court remand the matter to the ICC for further consideration. However, upon careful consideration of the record and briefs, and after hearing oral argument, we are convinced that the decision of the Commission was based on a consideration of the relevant factors and that there has not been a clear error of judgment. We hold that the Commission's action was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that it is supported by substantial evidence. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 42 L.Ed.2d 447 (1974), *rehearing denied*, 43 L.Ed.2d 433 (1975).

It is accordingly adjudged that the complaint be, and it hereby is,

Dismissed.

/s/ G. Braxton Craven
G. Braxton Craven
United States Circuit Judge

/s/ Eugene A. Gordon
Eugene A. Gordon
United States District Judge

/s/ Hiram H. Ward
Hiram H. Ward
United States District Judge

A True Copy

Teste:

Carmon J. Stuart, Clerk
By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

[Service Date July 31, 1972]

INTERSTATE COMMERCE COMMISSION

No. MC-F-10522 [1]

OLD DOMINION FREIGHT LINE—CONTROL—
BARNES TRUCK LINE, INC.

Decided

In No. MC-F-10522, application of Old Dominion Freight Line for authority to acquire control of Barnes Truck Line, Inc., through purchase of capital stock, and of L. C. Crowder, E. E. Congdon, and J. R. Congdon through such acquisition of control, denied without prejudice.[2]

In Finance Docket No. 25769, application of Old Dominion Freight Line for authority to issue 10 promissory notes, not exceeding $1,800,000, in connection with the stock acquisition, denied without prejudice.[2]

Francis W. McInerny and *Harry J. Jordan for applicants.*

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[1] This report embraces Finance Docket No. 25769, Old Dominion Freight Line—Notes.

[2] Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above. Replies thereto may be filed within 30 days after the final date for filing exceptions.

John C. Bradley, Dennis E. Curtis, Frederick J. Graf, David K. Grayson, Thomas F. Kilroy, William F. King, Eugene T. Liipfert, Linwood C. Major, Jr., Ronald B. Matalie, Dennis J. Taylor, James M. Verner, and *Edward G. Villalon* for protestants.

Report and Order
Recommended by Melvin L. Winson, Hearing Examiner

INTRODUCTION

By an application filed on June 25, 1969, Old Dominion Freight Line, of High Point, N.C.[3] seeks authority under section 5 of the Interstate Commerce Act to acquire control of Barnes Truck Line, Inc., of Wilson, N. C., through purchase of its outstanding capital stock for $2,100,000, subject to adjustment. Mrs. L. C. Crowder and her sons, E. E. Congdon and J. R. Congdon, also of High Point, who control OD through ownership of its outstanding common stock, seek authority under the same section to acquire concurrent control of Barnes through the transaction.

By an application filed on July 11, 1969, in Finance Docket No. 25769, OD seeks authority under section 214 of the act to issue 10 promissory notes aggregating $1,800,000 partly to finance the section-5 transaction.

The applications were referred to the Examiner for hearing and recommendation of an appropriate order thereon. Such hearing was held on December 2-5 and 16-19, 1969, at Washington, D. C., where the section-5 application was opposed by six motor common carriers,[4] and, the sec-

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[3] All carrier parties will be hereinafter identified by their initials or the first part of their names.

[4] Aero Mayflower Transit Company, Inc., Colonial Motor Freight Line, Inc., Jenkins Truck Line, Inc., Overnite Transportation Company, Turner's Express, Incorporated, and Wilson Trucking Corporation.

tion-214 application by Colonial and WTC. However, Mayflower and Turner's withdrew when applicants accepted a restriction on Barnes' general-commodity authority (1) against the transportation of household goods, as defined by the Commission, sought by the former, and (2) against the transportation of traffic originating at Franklin or Norfolk, Va., or points within 20 miles thereof destined to Baltimore, Md., or Philadelphia, Pa., or points within 5 miles of each, and against traffic originating at the Baltimore-Philadelphia points and destined to the Virginia points, sought by the latter. Briefs were filed jointly by applicants and individually by CMF, Jenkins, OTC, and WTC. These parties operate in interstate or foreign commerce as common carriers by motor vehicle.

OD's aggregate gross operating revenues for the 12 consecutive months of the statutory period exceeded $300,000.

Pursuant to authority granted on July 16, 1969, under section 210a(b), as extended by order of December 16, 1969, OD assumed temporary control of Barnes, through management, effective on July 28, 1969, pending final determination of the section-5 application, for a management fee not to exceed $100 per year.

Applicants' Corporate History and Operations

OD, a Virginia corporation, has outstanding 820 shares of common stock, no par value, Mrs. Crowder holding 50 percent and the Congdons 25 percent each. Under certificates issued in No. MC-107478 and sub-numbered proceedings, it transports general commodities, with exceptions, over a network of regular routes, extending generally clockwise from Richmond, Va., to Norfolk, Raleigh and Greensboro, N. C., Danville, Va., and Greenville, S. C., Charlotte and Winston-Salem, N. C., and Martinsville, Va., serving numerous intermediate points, and offroute points mainly within 25 miles of the specified highways between Norfolk, Charlotte, and Martinsville. Under temporary authority granted in No. MC-F-10466 on May 8, 1969, it controls the irregular-route operations of White Transport Corporation, conducted under registered certificates authorizing the transportation partly of general commodities, with exceptions, between points between Anderson, Greenville, Spartanburg, and Laurens Counties, S. C., on the one hand, and, on the other, those in the entire State, and from Charleston, S. C., to points in Oconee and Pickens Counties, S. C. That application, entitled Old Dominion Freight Line—Control and Merger—White Transport Corp. is pending. In July of 1970, the transaction in No. MC-F-10680, Old Dominion Freight Line—Control and Merger—Nilson Motor Express, was consummated. As a result of this merger, OD acquired operating rights for the transportation of general commodities, with exceptions, over regular and irregular routes, between Charleston, Charlotte, and Norfolk, and of specified commodities over irregular routes. OD operated 153 tractors, 68 straight trucks, and 430 trailers, all but 2 of them closed vans. White operated 2 trucks, 11 tractors, and 37 trailers. OD has a terminal at Greenville (in conjunction with White), and headquarters and a major terminal at High Point (which serves Greensboro); other North Carolina terminals are at Eden, Roanoke Rapids, Henderson, and Charlotte, and one between Raleigh and Durham; it has a major terminal and extensive maintenance facilities at Richmond, with other Virginia terminals at Martinsville, Danivlle, Norfolk, and Newport News. OD has cartage agents at Suffolk and Franklin, Va., Burlington, Winston-Salem, Statesville, and Salisbury, N. C., and Greenville, S. C. All its terminals are adapted for the efficient handling of less-than-truckload shipments (1-t-1). Permanent personnel and equipment are assigned to each terminal and daily service is provided, including peddle runs to outlying areas. Terminal expense accounts for about 18 percent of its operating expenses. OD has 587 employees, of whom 226 are located at, or operate from, High Point

and 107 at Richmond. It maintains incentive programs, including profit-sharing and group-insurance plans, with the tenure of more than 100 of its employees exceeding 10 years. Its claim ratio of 1.71 percent in 1969 was well below the national average. It has a safety department and a program for the training of new employees. OD's distance between terminals is generally less than 200 miles, and its average haul per shipment is less than 150 miles. Its traffic is predominantly 1-t-l and it is estimated that 50 percent of its shipments weigh less than 1,000 pounds each. OD holds out overnight service between any two points on its system. It connects with 78 other carriers, and its only service restrictions are those imposed in its certificates.

BYL is a North Carolina corporation incorporated in June of 1948, and has outstanding 5,080 shares of capital stock. At that time Henry Clarence Barnes, Jr., acquired 10 percent of the stock and Roy L. and Eddie L. Barnes, his brothers, 45 percent each. Roy died on May 22, 1968, and Eddie on December 22, 1968. Henry, pursuant to a prior agreement with his brothers, purchased their stock from their estates on December 19, 1957. Although OD would merge the properties of BTL with its own, as soon as practicable, the brothers' agreement gives their children options to acquire the stock to an extent not greater than that held by their fathers. All the Barnes children, except Eddie Barnes' two minor daughters, have waived their rights under the agreement. Upon resolving the rights of the latter, both will have reached their majority by 1974, and any rights to purchase will expire a year later. It is intended that a proposal for merger will be submitted to the Commission.

BTL is authorized in No. MC-7640 and various sub-numbered proceedings to transport, over irregular routes, general commodities, with exceptions, (1) between a defined portion of eastern North Carolina, on the one hand, and,

on the other, points in Virginia on and east of U. S. Highway 15, except those in Accomack and Northhampton counties on the Eastern Shore, Baltimore, and an area of southeastern Pennsylvania which includes such points as Philadelphia, Lancaster, and York, subject to certain restrictions, (2) from Richmond and Norfolk, and Wilmington, N. C., to Smithfield, N. C., (3) between Wilson and points within 50 miles thereof, on the one hand, and on the other, points in North Carolina, South Carolina, and Virginia and (4) from Norfolk, Richmond, and Baltimore to points in Wayne County, N. C., and Faison and Burgaw, N. C. (all those points being in the area of North Carolina authorized under (1) above). It also has irregular-route, specified commodity authority to a number of States, thus flakeboard from Farmville, N. C., hay balers from Tarboro, N. C., and lumber from eastern North Carolina partly to Virginia agricultural machinery and related products from Tarboro, and hardboard sheets from Catawba, S. C. In connection with its agricultural-machinery authority from Tarboro, BTL is authorized to return materials and supplies used in the manufacture of the outbound commodities. It has other similar, but less extensive, authority in the Southeast. BTL maintains terminals at Wilson, Wilmington, N. C., Baltimore, Portsmouth, Va., and call stations at Philadelphia and Norfolk. It has 119 employees and operated 2 trucks, 80 tractors, and 110 trailers, including 69 flatbeds, 40 vans, and 1 lowbed. Fourteen of the vans were purchased in January of 1968.

Prior to the temporary control, BTL did not station equipment at Norfolk-Portsmouth, and its only operation of city equipment during the five years before the hearing was of single trucks, one each, at Wilson and Baltimore. At Virginia points and those in the Carolinas except Wilson, BTL had no "facilities or personnel for the platforming and movement of small shipments," nor had it ever had employees in Richmond or South Carolina; its total facilities in Virginia consisted of an agent at Norfolk

(where, in its traffic-study period, it handled no shipment of less than 20,000 pounds), and a telephone at Portsmouth. Prior to temporary control, BTL interlined no traffic with general-commodity carriers; its first concurrence with OD was in July of 1969, after such control. Applicants have not handled joint-line traffic with each other within the last 10 or more years. Before temporary authority, BTL interchanged with only one carrier, and leased equipment to three others, not, however, with any of the 10 carriers with which OD established joint-routing concurrences. There were no such tariff concurrences at either Doswell or Baltimore. For 5 or 6 years, BTL had an arrangement for the southbound movement of steel from the Pittsburgh area, the converse of its northbound lumber movement via Doswell, in which a carrier originated large shipments. Some of them exceeded 100,000 pounds, comprising several truckloads (t-1), en route to Carolina destinations, traversing Wilson, where the movement nominally became that of Barnes following the latter's inspection of the vehicle, execution of a lease, and cutting a freight bill. Following delivery of the freight and collection of the charges, a portion of the revenue was remitted to BTL.[5]

Agreement

Under an agreement dated June 4, 1969, OD would purchase from Henry Barnes 5,079 of 5,080 shares of BTL's outstanding capital stock for $2,100,000, subject to adjustment. Henry would retain one share, but OD would have

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[5] Citing *Murphy Motor Freight Lines, Inc.—Control and Merger*, 90 M.C.C. 535. CMF argues that the described practice does not constitute service under Barnes' rights. The Examiner disagrees. The *Murphy* ruling involved a selling carrier which was interlining with local carriers traffic destined to its own authorized points. The facts here fall short of establishing that BTL was operating in violation of the Commission's lease and interchange rules.

an option to purchase it for $100 within six years of the closing date. The purchase price would be paid $600,000 in cash or such date, the balance of $1,500,000 to be evidence by nine serial notes, the first three of $250,000 each due and payable one, two, and three years, respectively, from such date, bearing annual interest at the prime rate, but not greater than nine percent, on the principal amount of each, with the six others of $125,000 each payable four, five, six, seven, eight, and nine years, respectively, from that date, bearing interest at the prime rate, but not more than seven percent annually on the principal amount of each. All notes would secured by an assignment or pledge of all BTL's stock and by other security devices. The price is subject to adjustment depending on any encumbrances or contractual obligations, additional tax liabilities, or undisclosed assets on various dates.

Financial Data

OD's balance sheet as of September 30, 1969, shows assets aggregating $4,531,862, consisting of: Current assets $1,731,113, mainly cash $364,652, accounts receivable $848,921, and prepayments $351,620; tangible property, less depreciation, $2,504,800; intangible property 144,294; investments and advances—other $140,297; and deferred debits $11,358. Its liabilities were: Current liabilities $351,796, long-term debt due within one year $399,888; and long-term debt due after one year $1,167,789; capital stock $82,000, capital surplus $16,639 and earned surplus $2,013,746. OD's income statements for 1967, and 1968, and the first 9 months of 1969 show revenues of $5,402,215, $6,186,399, and $4,998,047, and net income, before provision for income taxes, of $257,391, $263,898, and $254,616, respectively.

BTL's balance sheet as of September 30, 1969, shows assets aggregating $1,881,694, consisting of: Current assets $806,421, comprised of cash $143,177, certificates of

deposit $331,728, accounts receivable $205,846; prepayments $124.564, and material and supplies $1,106; tangible property, less depreciation, $1,031,654; investments and advances—other $5,750; and deferred debits $37,869. Its liabilities were: Current liabilities $160,574, primarily income taxes accrued $135,718, and long term debt due within one year $144,800 and long term debt after one year $301,667; capital stock $508,000; and earned surplus $766,653. BTL's income statements for 1967, 1968, and the first 9 months of 1969 show revenues of 1,585,072, $2,270,209, and $2,051,603, and net income, after provision for income taxes, of $86,334, $243,063, and $207,176, respectively.

Unified Operations and Public Interest

OD, believing that continuing competitive shifts in interchange patterns made it necessary to expand its operations, and so maintain noncompetitive outlets and develop its economic opportunities,[6] first considered the possibility of acquiring control of BTL in 1967, although the latter's rights were irregular while its own were regular, except for those acquired in No. MC-F-10630, *supra*. Subsequent negotiations with Roy and Eddie Barnes, and with Henry Barnes following their demise, culminated in the agreement under consideration. The rights of OD and BTL are somewhat complementary, with the former's general-commodity authority to be extended basically north from Richmond to Baltimore and southeastern Pennsylvania. BTL's irregular-route area overlaps and extends beyond OD's regular routes. Before temporary control, their operations were completely different in that OD specialized in general-commodity, 1-t-1 traffic over its relatively short regular-routes, while BTL specialized in irregular-route,

[6] Historically, OD has been a short-haul carrier, and thus highly dependent on connecting lines. However, its joint-line traffic decreased from 60 percent of its total volume in 1959 to 48 percent in 1964 and 33 percent in 1969, although as of the hearing it interlined with some 98 connecting carriers.

t-1 tonnage of many more numerically commodities, even under its general-commodity rights, over longer distances. In view of the successful manner in which BTL's operations have been conducted, OD intends to continue them substantially intact, either as a wholly-owned subsidiary or, after merger, as a division. The intention, however, is to enlarge the latter's participation in the Philadelphia and Baltimore markets by engaging agents there. In addition, BTL is constructing new terminal at Baltimore. With facilities for handling 1-t-1. At the same time, it would utilize BTL extensive rights in Virginia and the Carolinas to blanket those States with a general-commodity operation in its own manner, of the type conducted by it and the three general-commodity protestants, but never by BTL. Under temporary authority, their combined operations have been limited principally to those between the Richmond area and OD points in south-central Virginia and the Carolinas, eliminating the circuitous, routing observe through the Norfolk gateway. As later detailed, both carriers were not taking advantage of BTL's complete Virginia coverage in the absence of appropriate facilities. Their traffic to Virginia points to the west and north of Richmond, including the populous Washington suburbs, was interlined at Richmond for delivery thereto despite the authority in BTL certificates to deliver direct, OD being "hesitant to bear the start-up costs without having some assurance that we will be able (through approval here) to continue operations." OD is unaware of any point in Virginia [7] where BTL "has had, in the recent past, sufficient (less-truckload) traffic to justify the operation (of a) so-called cross-dock terminal."

In the Richmond-Carolina operations, in which BTL's rights are used to and from the Wilson 50-mile are to avoid the Norfolk gateway. OD operates two round-trips

[7] Nor, apparently, anywhere else, with the possible exception of Wilson.

daily between Richmond and Henderson regularly over U. S. Highway 1 (or I-85 in its completed sections), transporting "the same traffic we (OD) have been hauling for years, really." Regarding the Brady [8] criteria for irregular-route service, its management is "willing to apply (for) conversion of some of the Barnes' irregular-route authority, as many carriers have done, if it is ever required." Although OD's authority between Richmond and Carolina (and south-central Virginia) points requires observance of the Norfolk gateway, it used Waverly, Va., instead between 1962 and the grant of temporary authority herein. That point in on U. S. Highway 460, about 44 miles southeast of Richmond and 38 miles west from the edge of the Norfolk commercial zone. Traversal through the Norfolk gateway as required by its authority, takes 7 hours and 316 miles, whereas through Waverly only 5 5/6 hours and 260 miles, a reduction of 56 miles and 70 minutes. By combining its rights with those of BTL, however, OD may operate over U. S. Highway 1 (I-85), between Richmond and Henderson, 113 miles, and Henderson and High Point, 110 miles, a distance of 223 miles, taking only 5 hours, a decrease of 37 miles and 50 minutes via Waverly, and 93 miles and 2 hours via Norfolk, savings which would increase with the completion of I-85. OD and BTL view such shortening of Richmond-Carolina operations as a point in their favor, noting that they can reduce the Richmond-High Point distance by 29 percent via Henderson instead of Norfolk, and 14 percent via Henderson instead of Waverly, with anticipated annual economies of approximately $28,458 as against Norfolk or $11,322 as against Waverly (two round trips daily, 255 days a year, at 30 cents a mile).[9] Joinder at Roanoke Rapids, also permitted under

[8] *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23 (1947).

[9] It would obviously make for more economical transportation of the Richmond-Carolina traffic that OD chooses to haul. However, OD's rights were not designed for that purpose, while those

the combined rights, would make a route 75 miles (24 percent) shorter than via Norfolk and 19 miles (7 percent) shorter than via Waverly. Protestants, however, are of the view that OD's long-continued service via Waverly, performed on the basis of its Richmond-Norfolk deviation route, was contrary to its authority, without color of right, and, in effect, makes OD unfit. In any event, the traffic moved through Waverly before temporary control is not entitled to any consideration.

In addition to the savings to be achieved by joinder of the rights of OD and BTL, compared with their separate circuitous routes, they stress that they are natural partners insofar as their traffic patterns are concerned. OD, at Charlotte, Raleigh-Durham, and Norfolk-Newport News, suffers from a substantial traffic imbalance, Charlotte outbound volume being so much heavier that it annually deadheads 1,198 units to that point, whereas Raleigh-Durham inbound traffic is so much heavier than outbound that OD deadheads 823 units from that point, while the similar but aggravated situation prevailing in the Norfolk-Newport News area accounts for 2,927 units deadheaded outbound.[10] BTL moreover deadheads 1,008 flatbeds annually from Charlotte to Raleigh. Following approval here, OD would replace some of the latter's flatbeds with open-top vans or convertavans, where such equipment could be used for its commodities southbound to Charlotte and its own volume or consolidated 1-t-1 shipments from Charlotte, with estimated annual savings aggregating $102,816. Such equipment would also be used for BTL's northbound

of others were. There is no doubt that by its unauthorized operation via Waverly, OD has participated in that traffic to a greater degree than it would have if it had confined its operations to its certificated authority. But, even so, its volume of that traffic is relatively small.

[10] All figures are projected from those of September, October, and November of 1969.

van traffic, since it annually deadheads 750 vans south from Baltimore-southeastern Pennsylvania. With open-tops or converta-vans, it could handle the same northbound commodities, principally paper and plywood, for which BTL utilizes regular vans. OD hopes to haul some of the southbound flatbed traffic available to BTL in that area, especially, in open-tops, of which there seemed to be more available than the latter was handling. OD attributes BTL's failure to use the more versatile open-tops to the trouble the latter experienced in getting the drivers to re-tarp its vehicles after unloading. OD, however, is will to pay the drivers to do so in view of the deadhead miles which the use of open-tops could eliminate. Another favorable result would be the more efficient handling of traffic, in which OD now participates through interchange at various North Carolina gateways (Charlotte, High Point, Greensboro, Durham, and Winston-Salem), particularly that to, from, or through Philadelphia or Baltimore. The next data demonstrate OD's participation in traffic moving between points on its system and points beyond, to, from, or through Baltimore or Philadelphia. Of 1,315 shipments weighing 781,750 pounds, consigned in June of 1969, from eastern points to its own points, other than those in the Norfolk area, 767 or more than half would have been sidetracked from circuitous routing, had they been given it at either Philadelphia or Baltimore instead of Carolina points. Thus, a shipment from Brooklyn, N. Y., to Warrenton, N. C. (near Henderson), was received at Greensboro and one from Paterson, N. J., to Durham was transferred to it at Charlotte, to be backhauled, respectively, more than 100 and 125 miles to the northeast. If OD were permitted to receive such shipments at Philadelphia or Baltimore, it would endeavor, through better service, to divert the freight from the long-haul carriers now handling it in such circuitous fashion. It does not appear that it has approached either of the carriers from which it got the Warrenton and Durham shipments concerning interchange at Raleigh, but one has no terminal there or

at Richmond, although, without BTL, Richmond interchange would subject these shipments to the circuity of its own routes via Norfolk. OD concedes that, under the limited temporary operation of BTL, its routing of Carolina traffic through Richmond to WTC for such destinations as Charlottesville or Stuarts Draft, Va., is circuitous. But it obtains its long hauls in that manner, and if this transaction should be approved, it could, once the necessary facilities were established, deliver that traffic itself without circuity.

In connection with the reasonableness of the purchase price and the financial soundness of the transaction, OD asserts that in 1967, 1968, and 1969 it recognized that, because of the loss of connecting-line traffic resulting from unifications or extensions by competitors, it must, to remain competitive, expand the geographical scope of its operation, acquire additional interchange points to offset the loss of noncompetitive outlets and the policies of connecting carriers in limiting their service to two-lines and restrictions as to commodities. Longer hauls would counteract at least in part its own high-cost, short-route operations. OD believes that the purchase price is reasonable in view of the price-earning ratios of only 7 or 8 to 1, whereas those for other carriers are 16 or 17 to 1. While the proposed transaction is for OD to acquire only control of BTL through purchase of capital stock, they submitted a pro forma income statement reflecting unified operations for the first nine months of 1969, with immediate savings of $29,460 from reduced circuitous routing. On an annual basis, the amount approximates $40,000, not counting other savings. The parties point to a statement of projected income over a period of five years and three months extending from October 1, 1969, through 1974, based on an annual increase of revenue of five percent under OD's rights, 8 percent under White's rights, and 20 percent under BTL's rights in 1970, 15 percent in 1971, and by three annual increases of 10 percent in 1972, 1973, and 1974.

These figures are on the conservative side, having been used in obtaining long-term bank commitments. Consolidated gross revenues for 1970 were projected at $10,844,-163, resulting in net income at $517,991 after provision for income taxes. In the three succeeding years, an increase in these amounts is forecast. It is anticipated that gross revenues in 1974 will reach $13,591,801 and net income of $741,906 after provision for income taxes. To establish the financial feasibility of the transaction, applicants submitted a statement of projected cash flow for the period from October 1, 1969 through 1974 "which demonstrates that adequate cash and operating capital will be available to meet operating needs and debt-service requirements needed to finance the transactions," and one setting forth the projected payments on equipment obligations through 1974, as well as a statement of comparative-income information for OD, White, and BTL showing that the current ratios (debt to total capitalization) of those carriers "are confortably within the limits established by the Commission."

To demonstrate that the economic growth rate of Virginia and the Carolinas is highly favorable and that those States have "significant transportation linkage" with Baltimore and Philadelphia, applicants adduced evidence through an economist whose "essential ultimate conclusion" is that 'there is a large and growing motor-carrier related commodity producing industrial sector in the 3-State area, and a substantial quantity of these commodities will flow to the northeast * * * through * * * Baltimore and Philadelphia * * *." His studies indicate that the considered area's general economic growth is faster than the national average; that personal income grew faster than in the nation as a whole, while projections through 1985 signify that each of these States will exceed the national average; and that per capita personal income projections for them will exceed those for the nation as a whole. All the witness' studies suggest that these

States are in a high growth area, and that 'not only is there substantial employment in (motor-carrier related) commodity producing industries which generate a demand for motor-carrier movement, but * * * (increased employment) in most cases." There is, however, no correlation of the described growth with, nor even any recognition of, the growth of motor carriage in the area.

In October of 1969, some 2½ months after the assumption of temporary control and the start of the operations between Richmond and the Carolinas over the shorter routes, via Henderson or Roanoke Rapids, OD-BTL transported 1,572 Richmond-Carolina shipments weighing 1,137,810 pounds, averaging 724 pounds, including 15 t-l. In October of 1968, OD hauled 1,531 shipments of 898,753 pounds between Richmond and the Carolinas via Waverly, none t-l, averaging 587 pounds. Only 15 of the October 1969 shipments were to or from South Carolina OTC views the minimal increase in 1969 over 1968 as indicative of a lack of need for the service.

To demonstrate its participation in traffic moving between points on its system and points beyond, to, from, or through Baltimore or Philadelphia, OD shows movement in June of 1969 of 1,315 southbound joint-line shipments weighing 781,750 pounds from or through those cities to its system points other than those in the Norfolk area, and northbound from or through system points except Norfolk, to or through Baltimore or Philadelphia, 792 shipments of 511,356 pounds. In the same month, it participated in the joint-line transportation of 38 shipments of 50,812 pounds moving between Hopewell and Petersburg, Va., on the one hand, and on the other, points served by O-D; 442 shipments of 353,728 pounds moving to or from other Virginia points, including 209 shipments of 1,146,150 pounds in connection with White moving to or from South Carolina points beyond Greenville; with connecting carriers other than White, 567 shipments of 215,214 pounds mov-

ing to or from South Carolina. In addition to serving the Carolina and Virginia points directly or jointly with numerous connecting carriers, O-D also participates in the carriage of freight from, to, or through Georgia to the extent of 897 shipments weighing 840,194 pounds.

According to an analysis of BTL's traffic during one week of each month from December of 1968 through May of 1969,[11] BTL transported 1,388 shipments weighing 50,271,339 pounds, 907 under its general-commodity authority, 358 under its special-commodity authority, 24 under both, 87 under either of the first two, and 17 exempt. Sixty-five of the shipments weighed less than 10,000 pounds, the average exceeding 30,000 pounds. In doing this business, BTL served 36 widely scattered South Carolina points, (including a military base), ranging in population from 185 (Blenheim) to 100,000 (Columbia); 108 scattered North Carolina points (including 2 military installations) ranging in population from 103 (Admore) to 230,000 (Charlotte); and 51 scattered Virginia points (one military installation) whose population ranges from 200 (Dinwiddie) to 322,000 (Norfolk); There were consistent movements to and from Baltimore, BTL's only authorized Maryland point, as well as service to and from 16 points, including Philadelphia and York, in its limited southeastern Pennsylvania area; In the six weeks of the study pe-

[11] Protestants stress that BTL's traffic study period came long after the start of negotiations, and that it has been held, notably in *Buckingham Transp., Inc.—Control and Merger*, 80 M.C.C. 245, that such traffic studies are not entitled to the weight of those not influenced by such negotiations. However, the application form itself (BMC-45 (Revised)) calls for an abstract of actual shipments (all or representative) transported by the carrier to be controlled for *"the 6 months preceding the filing of the application"* (emphasis added). The circumstances here explain the extended negotiation period. Moreover, the record makes it rather doubtful that the nature of BTL's traffic had changed in the 6 months in question from what it was prior to the start of negotiations.

riod, it transported 111 commodities for more than 100 shippers or consignees, including an impressive list of nationally known organizations, and in the entire period it served some 569 customers at 646 different points.

Protestants do not view these statistics as supporting approval of the section-5 application. WTC regards the list of 569 customers at 646 different points as deficient, pointing out that BTL classified as a customer the one who paid the freight charges. However, in some instances, errors were made in the compilation, as where a collect shipment of lumber from Staunton, Va. to Weldon, N. C., was paid for by the party in Weldon rather than the one in Staunton, although the Staunton Company is listed as the customer. Furthermore, only 9 of the 646 listings relate to BTL's contested area in Virginia. Even assuming the legitimacy of the nine thus catalogued, contested-area listings, they comprise only 1.39 percent of the total. WTC emphasizes that the 10 shipments originated there by BTL, involved only six commodities (5 of wine and 1 each of lumber, iron castings, lime, steel, and brick). Of BTL's 104 shipments delivered within the contested Virginia area during the study period, 65 consisted of lumber and related forest products (lumber 35, plywood 17, wooden poles 6, flakeboard 4, boards 2, and pine bark mulch 1); and with these commodities omitted,[12] the list shrinks to wine (1), steel articles (20), fertilizer (6), solar salt (1), fiberboard and/or boxes (10), and roofdeck (1). WTC observes that these 39 shipments, all t-1, were consigned to only 10 points. BTL originated merely five commodities at only four points and delivered only six at 10 points.

WTC's further analysis of BTL's traffic discloses that 16 t-1 of steel to Roanoke moved via the Port of Wilmington, N. C., 13 of them in the 6-day period between February

[12] Under its specific-commodity rights, Barnes is authorized to transport lumber from points in North Carolina on and east of U. S. Highway 29 to Virginia, among other destination States.

27 and March 5, 1969; that Cana's two shipments of fertilizer moved on March 7 and 27; that Lynchburg's four fertilizer shipments moved within 10 days, May 7 through 17; that Buena Vista's last receipt of fiberboard was on January 12; and that the only recurring movement in or out of the contested area was of wine from North Garden, about every 5 weeks. WTC's geographic analysis, limited to the contested area, but eliminating lumber and other wood products, and considering all the BTL shipments in the study period shows only two, both lumber, not included in the period's data. It also indicates the scattered nature of the few such shipments handled by BTL, with pickups at Kimballton (Giles County), Lynchburg, and Glasgow all about equi-distant from Roanoke. In contrast is WTC's service to some 54 points in the contested area with a population over 1,000, 45 of them served on the single day of June 30, 1969. On that same day WTC picked up 268 shipments at 35 points and delivered 867 shipments at 147 points. WTC underscores that, except for lumber and related products, Virginia points receiving no service from BTL in the study period included such "important population centers" as Arlington (175,700), Charlottesville (41,500), Fairfax (454,600), Fredericksburg (15,300), Harrisonburg (15,100), Salem (16,058), and Waynesboro (17,700), while shipments to Roanoke (103,000) were confined to steel movements, most of which took place in 6 days; and that service at Alexandria (108,000) was limited to a single t-l of steel, that comprising BTL's only traffic in the period to Washington's northern Virginia suburbs (750,000), again excepting lumber and related products.

To corroborate BTL's status as a t-l carrier of relatively few commodities, WTC developed that, before temporary authority, the former handled no shipments, such as one of 38 pounds of synthetic hosiery of Warranton, Va., nor a second of 435 pounds of cotton sheets and pillowcases to Charlottsville, nor a third of 680 pounds of alcoholic beverages to Quantico. "Other than at Wilson, Barnes Truck has no facilities anywhere for platform or platform handling of LTL traffic." A comparison of the terminal expenses of OD and BTL is revealing. During the first nine months of 1969, the latter's such expenses amounted to $355,810, while those of the former reached $914,066. Another sharp contrast is OD's 430-trailer fleet of 428 vans and only 2 flat beds, with BTL's 110 trailers. WTC asserts that the equipment, terminals, and other facilities, plus the modus oprrandi, of BTL, including the material reduction of circuity via important routes, under OD's control, will evolve into an essentially new service, with the attendant diversion of freight by the latter. Another form of attracting tonnage is through the use of the OD-BTL authority in "handling of Virginia intrastate traffic, i.e. between two points in ***. Virginia in interstate commerce via a point in North Carolina *** even Wilson intrastate traffic is subject to diversion by Old Dominion through the simple device of taking it out of the State and bringing it back." WTC emphasizes that its analysis of OD data on "acceptable circuity" discloses a wide variation in mileage between Richmond and (1) Martinsville, via High Point 24 percent, (2) Charlotte 46 percent, (3) Raleigh 67 percent (4) High Point 68 percent, and (5) Rocky Mount 85 percent. "Thus, the acquisition of the Barnes Truck authority would enable OD very definitely to shorten its authorized routes between Richmond and points in North Carolina."

OTC's general reaction to BTL's presentation of the scope of the latter's achive operations is to note that in the areas in which it is primarily interested, Richmond-Petersburg/Carolinas during the six months from December of 1968 through May of 1969, BTL handled only two shipments under 10,000 pounds (fabricated roof decks of 5,000 pounds) which can hardly be considered normal. Over all, 907 (56 percent) of the latter's 1,620 shipments consisted of lumber or related products, another 497 (31 per-

cent) were handled under special-commodity authority, and only 222 (14 percent) are classified, in a broad sense, under general commodities.

SHIPPER

A manufacturer of farm machinery and industrial equipment, with plants at Davenport, Iowa, and Tarboro, which BTL and Jenkins may serve, supports the application. It lost a large hay-baler contract about two years before the hearing, hereby contributing to a reduction in production at Tarboro. It operates in private carriage, shipper still has in its yards some 200 unsold hay balers produced for an automobile manufacturer. It has had no traffic from Tarboro for Barnes or Jenkins, but desires both to retain their appropriate authority.

PROTESTANTS

Jenkins, of Bettendorf, Iowa, under certificates issued in No. MC-61592 and many sub-numbered proceedings, may transport various commodities, over irregular routes, throughout the United States, except Hawaii. As pertinent here, it hauls (1) agricultural machinery and grain bins from the plant site of the supporting shipper at Davenport, Iowa, to points in 13 States generally in the midwest, (2) grain bins from the same shipper at Davenport to points in four States, (3) agricultural machinery, implements, and machinery parts from Tarboro to points in 13 States, including nine embraced in (1) above, and the District of Columbia, (4) materials and supplies used in the manufacture of these products from the same States to Tarboro, (5) agricultural machinery, agricultural implements, forestry machinery, and grain bins when moving with one or more of these items and parts for the named commodities when moving in mixed loads with the named commodities from the supporting shipper's Davenport site to 31 States, including Virginia and the Carolinas, and (6) materials

and supplies used in the manufacture of these commodities (except those in bulk, in tank vehicles, in the reverse direction). Its home office and terminal are within five miles of shipper's Davenport plant. Jenkins uses 177 road tractors and 234 trailers. It has approximately 175 employees.

BTL's authority which conflicts with that of Jenkins covers (1) hay balers from Tarboro to 12 of the States, and (2) materials and supplies used in the manufacture of balers in the reverse direction, (3) agricultural machinery, implements, and machinery parts from Tarboro to 20 States and (4) materials and related commodities in the reverse direction, except Ohio. To demonstrate the scope of its representative outbound service for the supporting shipper at Davenport, Jenkins points to 13 shipments ranging from 23,213 pounds to 41,391 pounds which it transported between June 11 and 26, 1969, from Davenport to points in Illinois, Minnesota, and Wisconsin. Except for one shipment of agricultural implements, the commodities consisted of grain bins and attachments and parts. However, it regularly serves the shipper from Davenport to other States. In 2½ years of holding the Tarboro authority, Jenkins transported only four inbound and seven outbound shipments. Shipper's loss of a large contract for the production of hay balers at Tarboro for a major account and engagement in private carriage have rendered vain Jenkin's repeated solicitation. From 75 to 80 percent of its traffic is on-line. Jenkins terminates an average of 22 vehicles monthly in the Tarboro area. Most of this equipment, when empty, is available for shipper's traffic. Jenkins has offered to station vehicles there, as it does at Davenport. Jenkins has never considered BTL a competitor despite the latter's authority, has never refused the shipper service, and the only complaint from the shipper came from moving "a boatload of tractors from New Orleans *** we didn't do it quite as quickly as they would have liked." It is "only when their (shipper) trucks can't handle the traf-

fic outbound and inbound, plus where they normally ship by regular route carriers, that they call upon us." Jenken's revenues approximate $2,000,000 annually. While it had a deficit of nearly $40,000 in 1968, it anticipated a profit of some $20,000 in 1969.

OD and BTL argue that there is no basis for a finding that approval here would injure Jenkins, noting the shipper's desire for continuation of their service at Davenport and Tarboro. While Jenkins emphasizes BTL's lack of traffic under the described authorities, except that under the last description, (34 States and DC to Tarboro), it transported one shipment from Indiana (agricultural implement parts) and one from New York (horticultural machinery, both of which not authorized), Jenkins claims are one from West Virginia (sheet steel), two from New Jersey (steel bars), three from Ohio (steel bars, strips, and "steel sheets and bars), and four from Georgia (paint and steel).

CMF, of High Point, under certificates issued in No. MC-1380 and sub-numbered proceedings, operates over regular and irregular routes, the former extending (1) between Charlotte and Baltimore, serving all North Carolina intermediate points, South Hill, Petersburg, Richmond, Ashland, Fredericksburg, and Alexandria, Va., Washington and Laurel, Md., and some 24 off-route points in the three States traversed, (2) between Greensboro, N.C., and Richmond, with service authorized at the intermediate points of Reidsville, N. C., and Danville, and the off-route points of Leakesville, Draper, Spray, Stoneville, Mayodan, Madison, and Walnut Cove, N. C., and South Boston, Va., (3) between High Point and Wilmington, Kinston, and Williamston, N. C., serving all intermediate points for delivery only, (4) between Raleigh and Henderson, N. C., serving all intermediate points, (5) between Marion and Salisbury, N.C., serving all intermediate and 16 off-route points, including Lenoir and Drexel, N. C., and (6) between High Point and Raleigh, serving all intermediate points

and nine off-route points. Its irregular-route authority extends (1) between Baltimore, on the one hand, and, on the other, a 13-county area in eastern North Carolina which overlaps several of its above-described regular routes, (2) between Raleigh, on the one hand, and, on the other, points in North Carolina on and east of U. S. Highway 52, (3) between Charlotte, on the one hand, and, on the other, Augusta, Ga., and points in North Carolina, South Carolina, and Tennessee within 150 miles of Charlotte, and (4) between Charlotte and points in North Carolina within 40 miles thereof, on the one hand, and, on the other, those in a triangular portion of Virginia, with Staunton at the apex and Bristol and Cape Henry at the base corners. CMF operates 34 trucks, 103 tractors, and 210 trailers, and stations pickup-and-delivery equipment at its terminals at High Point, Richmond, Charlotte, Hickory, Baltimore, Camden, and Greenville, S. C., CMF has 326 employees. On traffic within the South, it connects with around 39 carriers, principally at Charlotte, Richmond, Greenville, S. C., Greensboro, High Point, and Winston-Salem. On this traffic, CMF interchange with OD at Charlotte, Henderson, High Point, and Richmond. On East-South traffic, it interlines with some 43 carriers, mainly at Charlotte, Baltimore, Greenville, Greensboro, High Point, and Winston-Salem. On this freight, it connects with OD at Henderson and High Point. Much of CMF's traffic consists of furniture which, because of susceptibility to damage, does not lend itself to interchange of 1-t-1. Despite its many connections, only three percent of its total volume is interchanged. Some of the tonnage was interchanged for convenience its own service points. A sampling of CMF's traffic which it considers vulnerable to diversion by OD-BTL is illustrated by an abstract which shows that in the week of April 21, 1969, it handled southbound in single line 313 shipments weighing 1,158,215 pounds for revenue of $9,781, mostly from the Baltimore area to the Carolinas. Another abstract for the same week covers 663 shipments of 763,119 pounds for

revenue of $15,619 which moved northbound in single line. CMF perceives the diversity of the commodities so transported. Countering CMF's arguments regarding BTL's specialization in commodities and volume, OD-BTL point out that 166 of the 313 southbound shipments comprised only five commodities. Steel or auto parts 402,038 pounds, soap or washing compounds 239,005 pounds, candy 20,044 pounds, paint 28,052 pounds, and liquor 127,613 pounds. They emphasize that there was an even higher degree of specialization in CMF's direct northbound movement, in that the 663 shipments of 763,119 pounds consisted of only three commodities: Furniture 211,826 pounds, textiles or textile products 185,512 pounds, and soil pipe 293,718 pounds.

An analysis of the above abstracts by weight brackets shows that 93.7 percent of CMF's traffic in the study period consisted of shipments weighing less than 5,000 pounds and merely 4.3 percent of 10,000 or more pounds. However, an analysis of the "individual shipments shows that by weight (rather than per shipment) 43 shipments weighed a total of 1,295,418 pounds of the total of 1,921,334 pounds." Thus on a weight basis, more than 66% reflected truckload traffic. The abstract is also misleading in that CMF, in classifying the LTL shipments, failed to point out that they consisted of a limited number of commodities. Of the total of 976 shipments handled in both directions, reflected for the period shown, 487 of 933 shipments weighing less than 10,000 pounds, consisted of furniture movements (471 northbound and 16 southbound). Finally, OD-BTL state that CMF concedes that OD is partially competitive between High Point and Richmond, that BTL is competitive with CMF on t-1 traffic to and from Baltimore, and that the latter tacks its regular-and irregular-route authorities. CMF does not dispute the fact that "Barnes was an active *truckload carrier of iron* and *steel and iron and steel* articles southbound from Baltimore or *** of lumber, flake-

board, *pulpboard, sheets and boards, and millwork*" northbound. It is pointed out that, of the "customers" claimed by BTL, many are shown by the underlying documents to be shippers or receivers of just those commodities, and that many of its "customers" are consignees of shipments originating at but two important points Sparrows Point, Md. (steel), and Farmville, N. C. (flakeboard), although "the consignors at those points normally arranged for the transportation and routed the traffic."

Regarding the listing of BTL traffic to show commodities handled, CMF states that examination of the underlying documents reveals that 17 out of 186 shipments moved in intrastate commerce; but the total number of such commodities has not been greatly reduced thereby. Listing of BTL's commodities "as they apparently appear on shipping documents prepared by numerous people and no effort was made *** to group commodities by their normal generic descriptions ***." Of the shipments shown to have moved in June of 1969, from Philadelphia and Baltimore, and points in eastern territory destined to OD points (except Norfolk area), and in the reverse direction, in whose transportation it participated, CMF could have handled in single-line service 52 of 1,315 southbound and 60 of 792 northbound.

CMF asserts that it has never regarded BTL as a competitor for 1-t-1 traffic between Baltimore and CMF's southern points; that the latter is actively engaged in handling furniture, which some carriers shun; that BTL has never handled such traffic, whereas OD does; but lacks authority to serve Hickory; and that approval here would result in a substantially new, competitive service by allowing OD to move in on the Hickory furniture, even though neither OD nor BTL ever transported that traffic.

Overnite, of Richmond, pursuant to certificates issued in No. MC-109533 and sub-numbered proceedings, operates over regular and irregular routes in West Virginia, Vir-

ginia, North Carolina, South Carolina, Tennessee, Georgia and Alabama. Its regular routes extend between Bluefield, W. Va., and Lexington, Richmond, and Norfolk, Va., on the north, Kinston, N. C., Wilmington and on the east, Charleston, S. C., and Savannah, Macon, and Columbus, Ga., on the south, and, Chattanooga, Nashville, and Kingsport, Tenn., on the west. Its irregular-route authority extends partly between points in North Carolina on and east of U. S. Highways 29 and 21, on the one hand, and, on the other, Charlotte, High Point, Greensboro, Durham, Raleigh, Wilson, Henderson, and Roanoke Rapids, N. C.; and points in Virginia on and south of U. S. 58 and 258 between Danville and the Hampton Roads area; between Monroe, N. C., on the one hand, and, on the other, points in South Carolina, northern Georgia, eastern Tennessee, and a portion of southern Virginia; and between points on its regular routes between Atlanta, Ga., and High Point, on the one hand, and, on the other, points in North Carolina, and those in Georgia on and north of U. S. 80, with some restrictions at Rome, Ga. OTC maintains 48 terminals and offices throughout its system, makes numerous peddle runs, uses 394 trucks, 845 tractors, and 1,970 trailers, and employs some 3,200 individuals.

OTC considers itself an 1-t-1 specialist. Less than one percent of its shipments require the use of the full vehicular capacity. It is estimated that 85 percent of OTC's shipments weigh less than 10,000 pounds. It maintains concurrences with connecting carriers at virtually all principal terminal points, participating in bu au tariffs covering most of the nation.

OTC's "stake in this proceeding is high." It submitted a traffic study for a sample day, November 5, listing 1969, 815 shipments between weighing 1,208,503 pounds for revenue of $16,160 carried by it between Richmond and its terminals in North Carolina (561), South Carolina (101), Tennessee (45), Georgia (106), and Alabama (2). The number

of shipments, volume, and revenue constitute 6.2, 8.1, and 8.4 percent of the respective totals of its system. OTC maintains that the Carolina shipments (81.3 percent) would be divertible to single-line OD-BTL service and the remainder to joint-line service in which they could participate via interchange at OD's "present western terminals" at Charlotte, Winston-Salem, and Greenville, as well as at BTL's terminals planned for construction in South Carolina. In addition to this freight, OTC "would also suffer diversion of interline traffic which it now receives from Old Dominion destined for Overnite's points in Virginia and South Carolina. During June 1969, Overnite received from Old Dominion 15 shipments weighing a total of 106,943 pounds destined to points in Virginia. This represented almost one-third of the total tonnage (353,728 pounds) which moved in joint-line service between points in Virginia *** and points served direct by Old Dominion ***." During the same month, OTC received from OD 26 shipments weighing 25,973 pounds destined to points in South Carolina. All of this traffic would be lost to OTC if the proposed transactions were approved, because "in every instance Old Dominion would be able to provide direct service ***."

The "reduction in circuity would clearly make Old Dominion competitive with Overnite between Richmond and Old Dominion's presently authorized points in western North Carolina" and those in South Carolina. Such reduction ranges from 19.2 percent between Richmond and Wilmington, 41.5 percent between Richmond and Raleigh, 52.1 percent between Richmond and Henderson, and 22.0 percent between Richmond and Greenville. However, "for over seven years, OD "has not moved traffic between Richmond and North Carolina through the joinder of its service routes at Norfolk. It has a deviation route *** between Richmond and Norfolk, which traverses" Waverly. "Lacking a service route" between Richmond and Waverly, OD "has no authority to tack at Waverly with its North Caro-

lina route." In October of 1968, OD hauled 1,304 shipments between Richmond and North Carolina. But not one of them was handled over OD's authorized regular route authority. "This unlawful operation assumes determinative proportions here. OD "may not rely on any of the 1,304 shipments it carried since they were all transported unlawfully. And it is dubious that Old Dominion would have carried more than a fraction had it employed its service route; for the Waverly routing eliminates much of the circuity of Old Dominion's Norfolk route."

"The unrestricted approval of the instant application would create unwarranted and unlawful diversion from" OTC. There can be no doubt that the result would be the creation of a direct regular-route type service between the Richmond-Petersburg area and the Carolinas. It is fairly certain that this would be a new service. BTL has conducted virtually no operations in this quite extensive territory and its authority, in this respect, is dormant.

A year before the hearing (December 1969), OTC did not regard OD as a competitor between Richmond-Petersburg and the Carolinas.[13] That situation did not change following OD's temporary control of BTL in July of 1969, but OTC would not expect it to continue if permanent control were approved here. Taking BTL's traffic showing, plus the shipments culled by OTC from BTL's freight bills for the entire 6-month period (BTL's showing was based on 6 weeks of that 6-month period), OTC demonstrates that there were no BTL shipments between the *Richmond-Petersburg area* and *Georgia;* and between that area and the *Carolinas,* 66 (55 North Carolina and 11 South Carolina) shipments weighing 2,250,328 pounds; 22 (freight, all kinds) from Bellbluff (Richmond Quartermaster Depot), Va., to Cherry Point and Camp LeJeune, N. C., all under general-commodity authority; 29 from North Carolina points (Riegel-

[13] By the same token, it points out its inability to seriously compete with OD between Richmond and Norfolk in view of the circuity of its own routes between those points.

wood-6, Farmville-2, Wilmington-13, New Bern-3, Kinston-2, Williamston, Conway, and Goldsboro) to Richmond; eight under specific commodity authority (three from New Bern, two from Kinston, and one each from Williamston, Wilmington and Goldsboro); and 21 under general-commodity authority (12 from Wilmington, six from Riegelwood, two from Farmville, and one from Conway); 10 from Richmond to South Carolina (Timmonsville, 9, and Spartanburg), all billed as concrete tile and slab, concrete, or tile, and all under general-commodity authority; 3 (cotton linters) from "Hopewell (Petersburg), Va.," to Mebane, Cherokee, and Byson City, N. C., under general-commodity authority; 1 (steel wire) from North Charleston, S. C., to Richmond under general-commodity authority; and 1 (native plywood veneer) from Weldon to Petersburg, under specific-commodity authority. As between the Richmond area and Georgia-Tennessee, OTC points to its 1-day handling, respectively, of 106 of 45 shipments, in contrast to BTL's lack of such shipments, and OD's failure to show any relating to Tennessee; and as between Georgia and OD points, none originated at Richmond, with those destined thereto (averaging less than 1 daily), having been received by OD at Carolina points and thus "transported over the unlawful Waverly cutoff route."

OTC's only competition from either applicant has been experienced from OD between the Norfolk area and North Carolina's Piedmont area, each maintaining terminals in the latter territory at Charlotte, Salisbury, Raleigh-Durham, and in the area of Winston-Salem, High Point, and Greensboro. OTC serves 102 of OD's 124 North Carolina points, and all four in South Carolina OTC alleges that applicants' showing is deficient under the Commission's policy regarding "new service" in section 5 proceedings, which is that service is "permissibly 'improved' " rather than "impermissibly 'new' " service[14] in that (a) they

[14] Citing *Great Coastal Exp., Inc.—Purchase—Price Transfer,* 97 M.C.C. 271 (1964), *Thurston Motor Lines, Inc., Control and*

have never interchanged with each other or between them and other carriers, (b) BTL's Richmond-Carolina traffic has been insignificant, and (c) OD's participation in such traffic has been tainted by its unlawful nature. OTC asks that approval here be conditioned on the cancellation of BTL's authority between Richmond-Petersburg and the Carolinas.[15] Applicants, on the other hand, argue that the "most cursory analysis of the Overnite traffic evidence makes manifest the inappropriateness of the term 'divertible'" in connection therewith, in that substantially all the Richmond-Carolinas traffic may now be transported by OD (allowing that use of OD routes would require observance of the Norfolk gateway); that OTC's Georgia-Tennessee Alabama traffic is principally single-line, whereas applicants, following approval here, would still have to participate in joint-line movements (with third carriers) to reach such points; that OTC interlines with a carrier at Richmond certain New England and Middle Atlantic traffic in which OD participates; that approval of the transaction would not substantially improve OD's opportunity to compete for New England or New York State traffic since it would still have to interline albeit over a more northern gateway (Philadelphia or Baltimore). Overall, applicants assert that not much of OTC's freight can realistically be considered as divertible. As illustrations,

Merger, 104 M.C.C. 1 (1967), and *Carolina Frt. Carriers Corp.—Purchase—Wilson*, 104 M.C.C. 730 (1968), and arguing that Great Coastal is also similar in that operations conducted under temporary authority only scratched the surface of those possible.

[15] Arguing that, premises considered, OD's burden was to show public convenience and necessity, but that it made only a token effort to do so, through its economist witness, whose evidence of the "burgeoning growth" of the three States only serves to underscore the minimal nature of BTL's Richmond-Carolina service, and that, to the extent traffic in the three States has increased, existing carriers, absent a showing that their service is inadequate, are entitled to transport it by virtue of their continuing service and the devotion of their facilities thereto.

they cite the inclusion of 19 shipments (30,346 pounds, $695) from Richmond to direct OTC points in Tennessee which would require an interchange by OD, even as now, and, as similar other examples, 26 shipments from Tennessee (148,246 pounds, $1,150), 38 shipments to Georgia (253,250 pounds, $2,449), 69 shipments from Georgia (95,628 pounds, $2,182), and two shipments from Alabama (1,723 pounds, $69), all included by OTC, despite its ability, almost without exception to serve the considered points direct. OD and BTL, however, would have to connect with another carrier to handle such traffic.

Applicants say that "Common sense and fairness compels the initial conclusion that the 111 (sic, 153) shipments on Exhibit 137 moving to or from Tennessee, Georgia, or Alabama should be excluded." They also argue, in connection with New England and Middle Atlantic traffic, that OTC, "by necessary implication, admitted that the likelihood of diverting traffic from a long established interline carrier" was remote, and, in addition, the "strong identification of Overnite at and around Richmond would tend to offset any improved service that may come about" as a result of approval here. Regardless of the divertibility of the traffic in which OD can now participate, on more or less equal terms, and that would appear to be minimal in view of its Richmond-Carolina circuity, there can be little doubt that the latter factor handicaps it in competition with OTC, and that neither OD nor BTL, nor both together, handle anywhere near the Richmond-Carolina traffic transported by OTC. However, approval without a condition of the nature sought by it would put them in position to do so.

WTC, of Waynesboro, operates within Virginia, except for service in (1) Washington, commercial zone, and (2) alternate routes through Maryland between Washington and points in Northampton and Accomack Counties, Va. (Eastern Shore). Its network of regular routes blankets an

area of Virginia between (and extending beyond) the major points of Winchester and Alexandria, Va., and Washington, on the north, Covington, Roanoke, and Lynchburg on the southwest, and the Tidewater area, including Norfolk, Newport News, and Suffolk, on the southeast. It uses 140 trucks, 123 tractors, and 280 trailers, and has 16 terminals at the points just named and others except Newport News and Suffolk. WTC serves more than 1,000 Virginia points and, because of the nature of its rights, most of its interstate traffic is interlined connecting with 96 carriers, 43 of them in common with OD. In October of 1969 (a 5-week "accounting" month), those 43 carriers gave it 32,266 shipments weighing 20,479,374 pounds for revenue of $241,705 representing 34 percent of its shipments and 25 percent of its revenue for the period. Seven of those carriers reciprocated with almost 60 percent of the total, a small percentage from OTC being intrastate traffic. WTC's interchange with those carriers (and one more) is heavily overbalanced inbound, as shown by the 1968 data in the table below, and the same situation prevails systemwise, it having received in 1968 210 million pounds from connections to which it gave only 93.1 million pounds: [16]

Carrier	Outbound (pounds)	Inbound (pounds)
Hall's	4,700,000	12,700,000
Hennis	3,700,000	31,800,000
Johnson Motor	4,600,000	9,100,000
Overnite	9,100,000	14,700,000
Roadway	500,000	5,100,000
Thurston	175,000	4,200,000
Bell	2,971,000	11,560,000

[16] WTC's traffic imbalance is magnified at such terminal areas as White Stone-Kilmarnock (at the southeast corner of Virginia's Northern Neck) which it serves daily but where it delivers 23.48 shipments for each one originated, the poundage ratio being 24.47 to one.

Being so dependent on its connections, WTC does not relish the possibility of OD's acquiring competitive authority and possible offering greater inducements to the same carriers. It points to its diminishing interchange with Hall's which, since it acquisition of Accelerated, is setting up facilities throughout Virginia to handle the direct traffic it once shared with WTC, a practice also being followed by Hennis and Thurston.

WTC carriers as many as 896,000 shipments annually, and in 1968 and the first 9 months of 1969, respectively, 98.95 and 98.98 percent of its shipments weighed less than 10,000 pounds. A 1-day traffic study (June 30, 1969) shows its participation in 1,425 shipments of 993,863 pounds, averaging 697 pounds moving to or from its authorized Virginia points. The 347 outbound shpments were from 43 points and the 1,090 inbound, some having been in transit more than 1 day, accounting for the gain of 12 shipments, were delivered at 167 Virginia destinations. The three leading points in the respective categories are Richmond (43), Crozet (35), and Verona (19), and Harrisonburg (64), Norfolk and Roanoke (62 each), and Charlottesville (57). WTC emphasizes that all but eight of the origins (Bellwood, Chesapeake, Norfolk, Petersburg, Portsmouth, Richmond, Smithfield, and Suffolk and 17 of the destinations, generally from Richmond and Petersburg, on the northwest, to Suffolk and Virginia Beach, on the southeast, constitute a convenience route) and are in the Virginia "contested" area. About 6 percent (84) of the shipments (41,878 pounds) and 2 percent (24) moved to or from North and South Carolina, respectively. Although other shipments were from or to New England, Middle Atlantic, and Central Territory points, WTC believes they would be divertible by OD-BTL (by tacking in BTL's northern North Carolina 50-mile area) via Philadelphia, Baltimore, or Richmond. OD participated with WTC in the movement of only four of the shipments, while OTC participated in the movement of 54 to or from the Caro-

linas or beyond. Of the 1,531 shipments weighing 898,753 pounds shown by OD to have moved by it between Richmond and the Carolinas in that month, 38 involved different destinations, only two of which, Ivor and Windsor, are not in the contested area, and included 16 different commodities, preponderantly furniture (35 shipments), handled by WTC for the most part to small towns in peddle deliveries. October 1969 saw similar Wilson handling of 111 shipments of 40,314 pounds average 319 pounds). Of the 1,572 shipments of 1,137,810 pounds disclosed by applicants to have been moved between the same points by combining their authority Henderson or Roanoke Rapids, 24 commodities, again preponderantly furniture (31 shipments), to 42 destinations, only one of which (Surry) was not in the contested area. Of the 442 shipments of 353,728 pounds OD showed moving between its system and Virginia points in June 1969, WTC received from OD (most at Richmond, but several at Norfolk and one at Thomasville, N. C.) 116 shipments weighing 55,157 pounds averaging 475, pounds including 25 different commodities (46 of furniture) destined to 45 different points. It views all that traffic (received from OD) as subject to diversion under the proposal, and emphasizes that its truckload traffic of the type transported by BTL [17] is a very small percentage of its total.

In connection with the proposed joinder of regular-and irregular-route rights, applicants note that WTC conducts 1-t-1 operations between its regular-and irregular-route points through its regular-route terminals and one in its irregular-route area, at Kilmarnock, and argue that the "partially competitive relationship" between OD and WTC, and their individual policies, are reflected in the showing that OD originated 110 shipments in June 1969

[17] Illustrated by its extraction of the 10 shipments (all of 30,000 pounds or more, except one, wine, 6,171 pounds) totaling 309,001 pounds it found listed in BTL 6-weeks' (over a period of 6 months) data as moving to or from points in the contested area.

which were tendered to WTC for delivery, while, in the same period WTC gave OD only three shipments for delivery, although it originated 20 shipments destined to OD points which it gave to other carriers, principally OTC. Applicants maintain that WTC's principal traffic evidence, like that of OTC and Colonial, includes freight not likely to be diverted, stressing that of the 1,425 shipments WTC handled on June 30, 1969, 157 moved to or from points in the Virginia area in which WTC concedes OD to be competitive (i.e., that outside the contested area): Norfolk (73), Waverly (2), Newport News (14), Hampton (20), Virginia Beach (25), Portsmouth (14), Suffolk (5), and Cresapeake (4), while 56 shipments were to or from Washington and its commercial zone, which may be served direct by WTC, but, by OD and BTL only through interchange. At the same time, applicants depreciate WTC's view that Virginia traffic to and from New England, Middle Atlantic, and Central territories is divertible despite applicants' having to use circutous routings via North Carolina to handle such traffic and despite WTC's enjoyment of a substantial volume of traffic from two carriers having circuitous operating patterns between the same areas. The inference is that these carriers give traffic to WTC for Virginia delivery rather than deliver it (circuitously) themselves and that applicants must do the same. It should be observed, however, that the two carriers are among the three from whom WTC's receipts are in danger, because they are relying to an increasing extent on their own growing facilities in Virginia.

The examiner, too, that OD's excessive circuity, before its temporary operation of BTL between Richmond and North Carolina points (reaching 93 miles and 41.7 percent to and from High Point, via Norfolk, and 102 miles and 85 percent to and from Rocky Mount seemed to inhibit neither its desire nor its ability to accept shipments for movement between them. We cannot thus disagree with WTC's

argument that circuity alone is not a barrier to OD's entry to such traffic markets. It apparently operates on the basis that while running trucks, and it runs many, it may as well carry freight in them. This policy is aided, of course, by the short-mileage nature of its routes. But use by WTC of Waverly, rather than Norfolk, as a "gateway" for its Richmond-Carolina traffic, continued for some seven years on the flimsiest pretext, gives little reason to believe that the apparent degrees of circuity in such operations would always be the real ones.)

To demonstrate the number of shipments handled by WTC between Virginia points, on the one hand, and, on the other, points outside that State, which they maintain could be transported to and from northern and western points under BTL's rights only over highly circuitous routes, i.e. via North Carolina), applicants analyzed WTC's shipments territorially, finding that WTC participated in the movement of 65 Virginia-New England shipments (Maine 2, New Hampshire 2, Vermont 1, Massachusetts 40, Rhode Island 5, and Connecticut 15), 408 Virginia-Middle Atlantic shipments (Delaware 8, New Jersey 81, New York 66, Maryland 85, West Virginia 54, and Pennsylvania 114), 215 Virginia-Southeast shipments (North Carolina 85, South Carolina 25, Georgia 60, Alabama 12, and Tennessee 43), and 206 Virginia-Central Territory shipments (Indiana 30, Michigan 32, Ohio 115, and Wisconsin 29). Applicants observe that 54 of the southeastern shipments moved in connection with OTC, WTC's "preferred interline carrier," and argue that the "strength of the joint WTC-Overnite sales effort suggests that there will not be any change in the routings of southeastern traffic, routings of southeastern traffic, particularly since OTC is an excellent carrier and has the broad coverage desired by" WTC. Applicants furthermore assert that, despite WTC's fears of approval here, and the acknowledged circuity handicap OD-BTL would continue to have on northeastern and central-western traffic to and from Virginia, two similarly

handicapped carriers with circuitous operations through North Carolina gateways participated with WTC in 198 of the 1,425 shipments transported by it on June 30, 1969. As indicated however, those carriers have shown signs of delivering their own Virginia traffic, with adverse effect on WTC.

Looking into applicants' further analysis of WTC's freight leads them to conclude that it was received or transferred over "natural gateways," generally permitting the participating carriers to use their most direct routes, 1,327 of the 1,425 shipments having moved over Alexandria (101), principally to and from eastern points, Waynesboro (30), Richmond (637), Staunton (129), Winchester (42), Lynchburg (60), and Roanoke (328), with 58 moving in single-line service. Applicants belittle WTC's fear that OD would be able to divert interline traffic by reducing its divisions with connecting carrers, stating that OD's president testified that it "would not and could not participate in such a practice;" that line-haul carriers interlining with two or more short-haul carriers to or from common points deal with all on the same divisional basis, citing OTC's practice, and that the need for OD-BTL, in handling Virginia joint-line traffic moving from and to the northwest, north and northeast, to traverse a North Carolina gateway "would obviously result in OD's having higher costs than (WTC's)." To finance the section-5 application, in part, applicant seeks authority under section 214 to issue 10 promissory notes aggregating $1,800,000.

Discussion and Conclusions

The record here leaves little doubt that on its face the transaction (1) would be advantageous for OD and one well within its means to finance, (2) would preserve the BTL operation through the infusion of experienced management for that active carrier whose existence was endangered by the deaths in 1968 of the two older Barnes

brothers, who had built and managed its profitable operations, and (3) result in more and better service to the public form OD and, at the same time, in the continuation and improvement of BTL's t-1 operation, as historically conducted by it, each carrier and the public served by them gaining thereby. BTL already efficient t-1 operation benefiting from the infusion of financing, purchasing power, and experienced management, and OD's short-haul, regular-route operation from longer hauls and from interchange gateways, including authority to serve any point in the three States now traversed by its regular-routes, without having to observe its current circuitous gateways, especially between Richmond and the Carolina, would eventuate in considerable savings, especially with the reduction of elimination of deadhead mileage and the replacement of outmoded equipment.

Before the Commission may approve a transaction under section 5 of the Act, it must find that same will be consistent with the public interest, *Pacific Intermountain Exp. Co.—Control and Purchase,* 57 M.C.C. 467. As judicially construed, the phrase "consistent with the public interest" means compatible with, or not contradictory or hostile to, the public interest, *Great Northern Pac.—Merger—Great Northern,* 331 I.C.C. 228, 247 and *Pacific Power and Light Co.* v. *Federal Power Comm.,* 111 F (2d) 1014, 1016. As stated by the Supreme Court in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25: The term "public interest" has a direct relation to the adequacy of our transportation system, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. These words comprehend the interest of competing carriers, and the Commission considers the interest of such carriers, as well as the advantages and disadvantages which may accrue to the general public, *Mushroom Transp. Co., Inc.—Control—Smith & Howell Film,* 87 M.C.C. 584 589, and

Matlack, Inc.—Control—Southern and T. I. McCormack, 109 M.C.C. 861

The three general-commodity protestants recognize that BTL's rights are not "dormant" insofar as it actually operated thereunder. They are on solid ground when they argue that, as alternative to complete denial, BTL's general-commodity rights, which are practically dormant, should be cancelled, except (1) between the Richmond-Petersburg area, on the one hand, and, on the other, the Carolinas, (2) in the "contested" area of Virginia, and (3) as to limited commodities, principally iron and steel and iron and steel articles from the described area in southeastern Pennsylvania and Baltimore, and lumber, flakeboard, pulpboard, sheets and boards, and mill work from the southeastern area to the described northern points. If approval is limited thereto, BTL's, rights should be modified so as to require OD to "operate lawfully over its existing authorized routes and deviation route by way of Norfolk." [18]

[18] A professor of economics at the collegiate level and consultant specializing in economic development and urban affairs, with an impressive background, testified for applicants. He prepared a report on the economic development and rate of growth for Virginia and the Carolinas and between the three-state area and Baltimore-Philadelphia. The specific statistical indicators utilized, population, income, and employment, are generally accepted as the best available economic indicators for states and sub-regions below the national level. He presented a statistical study of such indicators designed to show the past, present, and projected development of the economy in each state compared with that of the United States. The three states "have enjoyed and will continue to enjoy a substantial rate of economic growth." There is a "large and growing motor carrier related commodity producing industrial sector in the three-state area, and a substantial quantity of these commodities will flow to the Northeast markets through the Baltimore and Philadelphia Gateways." Of 21 commodities shipped in large quantities by for-hire motor carriers in the United States, the percentages so moved range as high as 85.2 percent for surgical instruments and as low as the cut-off of 59.2 percent for

Going beyond the interest of each protestant, the focal aspect of this proceeding is the use to which OD would put BTL's rights in Virginia and the Carolinas—blanketing them with a small-shipment, general-commodity, peddle-service. It is no answer to the objection of protestants regarding the Brady criteria, supra, to say, as does OD, that it may move to have BTL's irregular-route rights converted to regular-route rights between its principal points, when the statement comes before the obvious fact. It is clear from OD's frankly stated intentions, and its express showing, that it would use, and under temporary control is using, BTL's rights in a manner not intended.[19]

Ultimate Findings

Upon consideration of all evidence of record, the Hearing Examiner finds that the section-5 application should be denied, without prejudice to the resubmission by the parties should they so desire, of a revised plan contemplating acquisition of control by OD of BTL and merger of the latter into the former, with the duplicate and dormant operating rights, as reflected generally in this report, eliminated. The related section-214 application should likewise be denied, without prejudice.

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women's, misses', girls' and infants' clothing. The ton-mile percentages differ slightly from the tonnage, but this is not important. The "inference from this is that these are states that are enjoying substantial economic growth, and in the aggregate from these indicators, more rapidly than the United States as a whole." WTC's counsel sought to explore with the expert witness the correlation between the number of available motor carriers and need in the future of additional service, to which applicant's counsel objected. The quantum of traffic which will move in particular regions of the country by various modes of transportation and specific carriers is hardly susceptible of approximation.

[19] *Falwell Fast Frt., Inc.,—Pur.—Draper, and Evans Line, Inc.*, 40 M.C.C. 439, aff'd, *Falwell* v. *United States*, 69 F. Supp. 71, per curiam, 330 U.S. 807.

ORDER

Premises considered, it is the ORDER of the Hearing Examiner that: (1) The transaction as presented in No. MC-F-10522 has not been shown to be consistent with the public interest and that the application should accordingly be denied, without prejudice.

(2) The related application in Finance Docket No. 25769 should likewise be denied, without prejudice.

By the Commission, Melvin L. Winson, Hearing Examiner.

Dated at Washington, D. C., this 30 day of June, 1972.

Joseph M. Harrington,
Acting Secretary

(SEAL)

[Service Date January 11, 1974]

Decision and Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 19th day of December, 1973.

No. MC-F-10522

OLD DOMINION FREIGHT LINE—CONTROL—
BARNES TRUCK LINE, INC.

FINANCE DOCKET No. 25769

OLD DOMINION FREIGHT LINE—NOTES

No. MC-107478 (Sub-No. 16)

OLD DOMINION FREIGHT LINE—
EXTENSION CONVERSION

Upon consideration of the record in the above-entitled proceedings, including (1) the report and recommended order of the Administrative Law Judge, served July 31, 1972, which found dormant large parts of the rights sought to be controlled, but, in most other respects, found that the proposed transaction was in the public interest, and denied the section 5 and section 214 applications, without prejudice to applicants' filing an amendment to the section 5 application proposing a control and merger transaction and deleting operating rights found dormant in said report, (2) the pleading of applicants filed December 4, 1972, containing (a) a petition for leave to amend the section 5 application in order to propose a control and merger transaction, (b) proposed conditions restricting the authority to be acquired, (c) a request for further hearing, and (d) exceptions to said report and recommended order, (3) replies to said pleading filed by Colonial Motor Freight, Inc. and Wilson Trucking Corporation, (4) the

application in No. MC-107478 (Sub-No. 16) filed December 5, 1972, proposing conversion of part of the rights authorized to be acquired from irregular-route authority to regular-route authority, (5) the order of the Commission dated April 12, 1973, consolidating disposition of No. MC-107478 (Sub-No. 16) with No. MC-F-10522, and (6) the letter-petition of Old Dominion Freight Line, Inc., (Old Dominion) filed March 23, 1973, seeking imposition of an additional restriction, described below, upon the rights to be acquired in order to satisfy the interests of a protestant in an unrelated proceeding, No. MC-F-11699, Old Dominion Freight Line—Control—Star Transportation Co., Inc., such restriction to become effective only upon approval and consummation of the applications in Nos. MC-F-10522 and MC-F-11699; and

It appearing, That further hearing is not warranted; that the findings and conclusions of the Administrative Law Judge, except as hereinafter modified, are in all material respects proper and correct; that the exceptions of applicants and the replies thereto raise no new or material matters of fact and law not adequately considered and properly disposed of by the Administrative Law Judge in his report, and that the said exceptions and replies, otherwise, are not of such nature as to require the issuance of a report discussing the evidence in the light of such pleadings;

It further appearing, That the control and merger transaction proposed by applicants in their pleading filed December 4, 1972, would be in the public interest, but that the restrictive conditions proposed by applicants, preventing the transportation of intrastate Virginia Shipments and requiring all Virginia traffic to be transported to, from, or through a point south of the Virginia-North Carolina State line are minor and too limited in scope to cancel the operations of Barnes Truck Line, Inc. (Barnes) found dormant by the Administrative Law Judge as detailed below, and should, therefore, not be imposed, but that such

operations should be cancelled by eliminating them from the operations which are herein authorized to be conducted by Old Dominion;

It further appearing, That the Administrative Law Judge found at page 27 of his report that Barnes' general commodity rights were dormant but for three exceptions, (1) between the Richmond-Petersburg area in Virginia, on the one hand, and, on the other, points in North and South Carolina, (2) within a portion of the State of Virginia designated the "contested" area in the Administrative Law Judge's report and (3) as limited to the transportation of specified commodities, principally iron and steel and iron and steel articles from Barnes' described territory in southeastern Pennsylvania and Baltimore, and lumber, flakeboard, pulpboard sheets and boards, from North and South Carolina to authorized points described in the appendix hereto; that the use of the term "contested" area in (2) above apparently was an inadvertent error since very little service thereto was performed by Barnes, and the said report should be modified to read the "uncontested" area of Virginia;

It further appearing, That, as noted at page 2 of the report of the Administrative Law Judge, protestant Turner's Express, Inc. withdrew its opposition based on an agreement with applicants that the general-commodity authority proposed to be transferred would be restricted against the transportation of traffic originating at Franklin or Norfolk, Va., or points within 20 miles thereof, destined to Baltimore, Md., or Philadelphia, Pa., or points within five miles thereof, and, conversely traffic originating at the Baltimore-Philadelphia points and destined to the aforesaid Virginia points; and that imposition of the described restriction would not adversely affect the public in the area involved or be contrary to the public interest;

It further appearing, That the report and recommended order of the Administrative Law Judge did not deal with

the specified commodity authority of Barnes sought to be controlled by Old Dominion; that the evidence of record, particularly applicants' shipping abstracts at Exhibits 71-72 show that of approximately 500 shipments carried in the period December 1968 through May 1969, under special commodity authority, virtually all consisted of lumber and related products, so that Barnes' specified commodity authority was dormant for all practical purposes except for the transportation of lumber, flakeboard, pulpboard and other lumber-related commodities from North and South Carolina and the "uncontested" area of Virginia, a situation consonant with the use of Barnes' general commodity authority based in the Carolina, which was also used largely for transporting lumber-related commodities; that no shipper testimony was presented to justify reactivation of the dormant rights, and that, accordingly, Barnes' specified commodity rights to be transferred should be limited to lumber and related products, as more particularly set forth in Appendix I hereto;

It further appearing, That in the application filed in No. MC-107478 (Sub-No. 16), as a matter directly related to the transaction proposed in No. MC-F-10522, Old Dominion seeks authority under section 207 of the act to convert a portion of the rights herein authorized to be acquired from irregular route to regular route; that by order of March 7, 1973, the application was assigned for handling under the modified procedure; that May 1, 1973, was fixed as the date on or before which applicant could file verified statements in support of the application, but that no such statements have filed by applicant; and that, in the absence thereof, said application should be denied, but that, due to the facts and circumstances in this and the embraced proceedings, such denial should be without prejudice to the filing by applicant of a petition seeking reopening of this proceeding for further processing under the modified procedure, but unless and until this conversion application is successfully prosecuted, applicant must

maintain the irregular route nature of the rights which it here seeks to convert to regular route rights;

It further appearing, That, as noted above, by letter-petition filed March 23, 1973, Old Dominion proposes an additional restriction upon the authority to be acquired in order to satisfy the interest of a protestant in an unrelated proceeding namely, No. MC-F-11669, Old Dominion Freight Line—Control—Star Transportation Co., Inc., prohibiting the transportation of traffic moving between certain Virginia points, on the one hand and, on the other, certain New Jersey points, as more particularly set out in Appendix II hereto, the said restriction to become operative only if and when the transactions in Nos. MC-F-10522 and MC-F-11699 are both authorized and consummated; but that, inasmuch as such restriction relates to the transaction proposed in No. MC-F-11669 and not to the transaction proposed here, it may not properly be imposed in the authority to be acquired here;

It further appearing, and we so find, that, in No. MC-F-10522, Old Dominion Freight Line, Inc. is able, financially and otherwise, to consummate the transaction; that the terms and conditions of the transaction, as set forth in the application and the agreement of record, would be just and reasonable; that the fixed charges to be incurred would not be contrary to the public interest; that carrier employees would not be adversely affected; and that the transaction is within the scope of section 5(2)(a), and will be consistent with the public interest; and

It further appearing, and we so find, that in Finance Docket No. 25769, the proposed issuance by Old Dominion Freight Line, Inc., as amended by filing of applicant on December 4, 1972, of the nine serial notes, dated as of the closing date, the first three for $250,000 each, due and payable one, two, and three years, respectively, from such date, bearing annual interest at the prime rate, but not greater than nine percent, the six other notes being for

$125,000 each, being payable four, five, six, seven, eight, and nine years, respectively, from date of issue, bearing interest at the prime rate, but not more than seven percent annually, as aforesaid, (a) is for a lawful object within the corporate purposes of Old Dominion Freight Line, Inc., and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier and which will not impair its ability to perform that service, and (b) is reasonable, necessary and appropriate for such purpose;

Wherefore, and good cause appearing therefor:

We find, That, except as indicated above, the evidence considered in the light of applicant's pleading and replies thereto does not warrant a result different from that reached by the Administrative Law Judge; that the statement of facts, the conclusions and findings of the Administrative Law Judge, being proper and correct in all material respects, except as set forth above, should be, and they are hereby, affirmed and adopted as our own; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the request for further hearing be, and it is, hereby, denied.

Is is further ordered, That the letter-petition, filed March 23, 1973, be, and it is hereby, denied.

It is further ordered, That the phrase "contested area of Virginia" on page 27 of the Administrative Law Judge's report be, and it is hereby, changed to read "uncontested area of Virginia."

It is further ordered, That, in No. MC-F-10522, the acquisition by Old Dominion Freight Line, Inc. of control

of Barnes Truck Line, Inc. through purchase of capital stock, merger of the operating rights and property of the latter into the former for ownership, management, and operation, and acquisition by L. C. Crowder, E. E. Congdon, and J. R. Congdon, of control of said operating rights and property through the transaction, upon the said terms and conditions, be, and they are hereby, approved and authorized; and that, if the transaction is consummated, Old Dominion Freight Line, Inc. will be entitled to operate under the operating rights set forth in Appendix I hereto, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name, with duplications eliminated; *provided, however,* that applicants, if they so wish, may adjust the acquisition price downward without requesting approval of this Commission.

It is further ordered, That, in Finance Docket No. 25769, Old Dominion Freight Line, Inc., be, and it is hereby, authorized, to issue nine serial notes, dated as of the closing date, the first three for $250,000 each, due and payable one, two, and three years, respectively, from such date, bearing annual interest at the prime rate, but not greater than nine percent, the six other notes being for $125,000 each, due and payable one, two, and three years, respectively, from such date, bearing annual interest at the prime rate, but not greater than nine percent, the six other notes being for $125,000 each, being payable four, five, six, seven, eight, and nine years respectively from date of issue, bearing interest at the prime rate, but not more than seven percent annually, pursuant to the terms and for the purposes set forth in the application and the record in these proceedings.

It is further ordered, That in No. MC-107478 (Sub-No. 16) the application be, and it is hereby, denied, without prejudice to the filing by applicant of a petition

seeking reopening of the proceeding for further processing under the modified procedure.

It is further ordered, That if the authority granted in No. MC-F-10522 is exercised, Old Dominion Freight Line, Inc. shall submit for consideration a sworn statement and one copy thereof, hereby required within 60 days after consummation of the transaction, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, and any other costs, incidental to the transaction, indicating the account number, and title to which each item has been or is to be, debited or credited.

It is further ordered, That if Old Dominion Freight Line, Inc., desires to consummate the transaction authorized in No. MC-F-10522, it shall confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That in Finance Docket No. 25769, Old Dominion Freight Line, Inc., shall report concerning the matters herein involved in conformity with the order of the Commission, by Division 3, dated May 20, 1964, as amended, respecting applications filed under section 214 of the Interstate Commerce Act (49 CFR 1115.6).

It is further ordered, That, except as herein authorized, said notes shall not be sold, pledged, repledged, or otherwise disposed of by Old Dominion Freight Line, Inc., unless or until so ordered or approved by this Commission.

It is further ordered, That pursuant to section 20a(3) of the Act, the Commission may, from time to time, for good cause shown, make such supplemental orders herein as it may deem necessary or appropriate, and may be any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and

extent to which, or the conditions under which, any securities so authorized or the proceeds thereof may be applied.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said notes, or interests thereon, on the part of the United States.

It is further ordered, That this order shall be effective 35 days from the date of service hereof;

It is further ordered, That unless the authority herein granted is exercised within 90 days from the effective date hereof, this order shall be of no further force and effect;

It is further ordered, That effective with consummation of the transaction herein authorized, or 90 days from the effective date hereof, whichever first occurs, the authority granted by the order of July 16, 1969, as extended by order of January 8, 1970, for temporary lease of the operating rights of Barnes Truck, Inc., shall be of no further force and effect; and

It is further ordered, That, except as expressly modified herein, the report and recommended order of the Administrative Law Judge, served July 31, 1972, be, and it is hereby, adopted as the order of the Commission, Division 3.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX I

Operating rights authorized to be acquired by Old Dominion Freight Line, Inc. in No. MC-F-10522.

IRREGULAR ROUTES:

General commodities, except dangerous explosives, household goods as defined by the Commission, those of unusual value, commodities in bulk, and commodities requiring special equipment.

From Richmond and Norfolk, Va., to Smithfield, N.C.

Between Wilson, N.C., and points and places within 50 miles of Wilson, on the one hand and, on the other, points and places in North Carolina, South Carolina and that part of Virginia south of a line drawn from Danville over U.S. Highway 360 to Richmond and thence over U.S. Highway 60 to Norfolk.

RESTRICTION: The above operating rights are restricted against the transportation of traffic originating at Franklin or Norfolk, Va., or points within 20 miles thereof; and destined to Baltimore, Md., or Philadelphia, Pa., or points within 5 miles thereof and, conversely, traffic originating at said Baltimore-Philadelphia points and destined to the said Virginia points.

Iron and Steel and iron and steel articles,

From Baltimore, Md. to points in Wayne County, N.C. and Faison and Burgaw, N.C.

Baltimore, Md. and points in Pennsylvania on and east of a line extending from the Maryland-Pennsylvania State line along Interstate Highway 83 (formerly U.S. Highway 111) to York, Pa. and on and south of a line extending from York along U.S. Highway

30 to junction of U.S. Highway 202, and thence along U.S. Highway 202 via New Hope, Pa. to the Pennsylvania-New Jersey state line to points in that part of North Carolina bounded by a line beginning at Jacksonville, N.C., and extending northward along U.S. Highway 258 to the North Carolina-Virginia State line, thence westward along the North Carolina-Virginia State line to junction U.S. Highway 301, thence southward along U.S. Highway 301 to Rocky Mount, N.C. thence along U.S. Highway 64 to Raleigh, N.C. thence along U.S. Highway 401 to the North Carolina-South Carolina State line, thence southeastward along the North Carolina-South Carolina State line to the Atlantic Ocean, and thence Northeastward along the coast and the west bank of New River to Jacksonville, N.C., including points on that line.

Lumber, flakeboard, pulpboard, sheets and boards and millwork,

From points in that part of North Carolina bounded by a line beginning at Jacksonville, N.C., and extending northward along U.S. Highway 258 to the North Carolina-Virginia State Line, thence westward along the North Carolina-Virginia State line to junction U.S. Highway 301, then southward along U.S. Highway 301 to Rocky Mount, N.C. thence along U.S. Highway 64 to Raleigh, N.C. thence along U.S. Highway 401 to the North Carolina-South Carolina State line, thence southeastward along the North Carolina-South Carolina State line to the Atlantic Ocean, and thence Northeastward along the coast and west bank of New River to Jacksonville, N.C., including points on that line, to Baltimore, Md., points in Virginia on the east of U.S. Highway 15 (except those in Accomack and Northampton Counties, Va.), and points in Pennsylvania on and east of a line extending from the Maryland-Pennsylvania State line along Interstate

Highway 83 (formerly U.S. Highway 111) to York, Pa., on and south of a line extending from York along U.S. Highway 30 to junction of U.S. Highway 202, and thence along U.S. Highway 202 via New Hope, Pa. to the Pennsylvania-New Jersey State line.

RESTRICTION: The operating rights in the last two paragraphs are restricted against the transportation of traffic originating at Franklin or Norfolk, Va., or points within 20 miles thereof, and destined to Baltimore, Md., or Philadelphia, Pa., or points within 5 miles thereof and, conversely, traffic originating at the said Baltimore-Philadelphia points and destined to the said Virginia points.

Lumber,

From points and places in that part of North Carolina on and east of U.S. Highway 29, to points and places in Virginia, Delaware, Maryland, New Jersey, Pennsylvania, and the District of Columbia.

with no transportation for compensation on return as otherwise authorized to the above specified origin points.

Lumber, except plywood and veneer,

From points in that part of North Carolina on and east of U.S. Highway 29 to points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Ohio, Illinois, Indiana, West Virginia, Kentucky, Tennessee and Florida with no transportation for compensation on return except as otherwise authorized.

Hardboard Sheets and Boards,

From Catawba, S.C., and points within five miles thereof, to Dover, Del., and points in Connecticut, New York (except points in the New York, N.Y. Commercial Zone, as defined by the Commission), and

New Jersey (except points in the Trenton, N.J., Philadelphia, Pa., and New York, N.Y. Commercial Zones, as defined by the Commission), with no transportation for compensation on return except as otherwise authorized.

Flakeboard,

From Farmville, N.C., to points in Delaware, Georgia, Maryland, New Jersey, Pennsylvania, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Virginia, Kentucky, Florida, Iowa, Wisconsin, and the District of Columbia, with no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The authority granted herein is restricted to the transportation of shipments originating at Farmville, N.C. and destined to points in the above-described destination territory.

Lumber and particle board,

From the plant site and storage facilities of Union Camp Corporation at Franklin, Va., to points in Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and the District of Columbia, with no transportation for compensation on return except as otherwise authorized.

Wood fiberboard,

From Moncure, N.C., to points in Connecticut, Georgia, New Jersey, South Carolina, and Virginia, with no transportation for compensation on return except as otherwise authorized.

The authority granted herein to the extent that it duplicates any authority heretofore granted to or now held by carrier shall not be construed as conferring more than one operating rights.

APPENDIX II

Proposed restriction in No. MC-F-11669

RESTRICTION: The operating rights above are restricted against the transportation of traffic which (1) originates at New York, New York, Newark or Mahwah, New Jersey, and points in their respective commercial zones destined to Franklin, Virginia, or points in its commercial zone, or Norfolk, Virginia, or points within twenty miles thereof, and (2) originates at Franklin, Virginia, and points in its commercial zone, or Norfolk, Virginia, or points within twenty miles thereof, destined to New York, New York, Newark, or Mahwah, New Jersey, or points in their respective commercial zones.

Service Date Nov. 6, 1974

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 29th day of October, October, 1974.

No. MC-F-10522 [1]

OLD DOMINION FREIGHT LINE—CONTROL—
BARNES TRUCK LINES, INC.

Upon consideration of the record in the above-entitled proceedings, including the initial decision of the Administrative law judge served July 31, 1974, which denied the application herein under section 5 of the Interstate Commerce Act, without prejudice to the submission of a revised proposal, the decision and order of the Commission, Division 3, served January 11, 1974, which approved the transfer of the authority set out in the appendix hereto, but found large portions of the vendor's authority to be dormant, the petition of applicants filed April 23, 1974, seeking further hearing or alternatively reconsideration on the present record of said decision and order, and the reply thereto filed July 22, 1974, by protestant Colonial Motor Freight Line, Inc.;

It appearing, That the applicants allege that the Division erred in finding large portions of the vendor's authority to be dormant; that, in addition, through an inadvertment error, the decision and order deleted the general commodity authority of vendor from Wilmington, N.C., to Smithfield, N.C., and described the Virginia destination area of the vendor's general commodity authority between Wilson, N.C., and points in Virginia as points in Virginia south of a prescribed line;

[1] This proceeding also embraces Finance Docket No. 25769 Old Dominion Freight Line-Notes, and No. MC-107478 (Sub-No. 16) Old Dominion Freight Lines-Extension Conversion.

It further appearing, That even though the vendor showed some shipments under those portions of its authority that had been ordered cancelled, the number of shipments are insignificant and are not of sufficient caliber to justify classifying the authority as active, and that applicants have not submitted evidence to justify reactivation of the dormant rights or shown the decision and order of December 19, 1973 to be in error;

It further appearing, That since the decision and order made no mention of the authority from Wilmington, N.C. to Smithfield, N.C., as being dormant and gave no reason for not describing the said Virginia destination area under the general commodity authority as being on and south of the prescribed line, the decision and order should be modified (1) to include in the authority to be retained by Barnes Truck Lines, Inc., and acquired by Old Dominion Freight Line, Inc., the authority between Wilmington, N.C., and Smithfield, N.C. and (2) to redescribe the description of the said Virginia destination area under general commodity authority as follows:

> "and that portion of Virginia on and south of a line extending from Danville over U.S. Highway 310 to Richmond and thence over U.S. Highway 6 to Norfolk."

It further appearing, That, except as previously set forth forth the petition seeking further hearing, or alternatively reconsideration, and the reply thereto, raise no new or material matters not adequately considered by the Division; and that there has been no error of fact of law with respect to the matters complained of by the petition; and

It further appearing, That this decision is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969:

It is ordered, That the said petition for further hearing, or, alternatively, reconsideration, except to the extent granted herein be, and they are hereby, denied; and that the decision and order of December 19, 1973, except or modified herein, shall be, and it is hereby, adopted as the order of the Commission, Division 3, acting as an Appellate Division, effective 35 days from the date of service hereof;

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX I

Operating rights authorized to be acquired by Old Dominion Freight Line, Inc. in No. MC-F-10522.

IRREGULAR ROUTES:

General commodities, except dangerous explosives, household goods as defined by the Commission, those of unusual value, commodities in bulk, and commodities requiring special equipment.

From Richmond and Norfolk, Va., to Smithfield, N.C.

Between Wilson, N.C., and points and places within 50 miles of Wilson, on the one hand and, on the other, points and places in North Carolina, South Carolina and that part of Virginia south of a line drawn from Danville over U.S. Highway 360 to Richmond and thence over U.S. Highway 60 to Norfolk.

RESTRICTION: The above operating rights are restricted against the transportation of traffic originating at Franklin or Norfolk, Va., or points within 20 miles thereof; and destined to Baltimore, Md., or Philadelphia, Pa., or points within 5 miles thereof and, conversely, traffic originating at said Baltimore-Philadelphia points and destined to the said Virginia points.

Iron and Steel and iron and steel articles,

From Baltimore, Md. to points in Wayne County, N.C. and Faison and Burgaw, N.C.

From Baltimore, Md. and points in Pennsylvania on and east of a line extending from the Maryland-Pennsylvania State line along Interstate Highway 83 (formerly U.S. Highway 111) to York, Pa. and on and

south of a line extending from York along U.S. Highway 30 to junction of U.S. Highway 202, and thence along U.S. Highway 202 via New Hope, Pa. to the Pennsylvania-New Jersey state line to points in that part of North Carolina bounded by a line beginning at Jacksonville, N.C., and extending northward along U.S. Highway 258 to the North Carolina-Virginia State line, thence westward along the North Carolina-Virginia State line to junction U.S. Highway 301, thence southward along U.S. Highway 301 to Rocky Mount, N.C. thence along U.S. Highway 64 to Raleigh, N.C. thence along U.S. Highway 401 to the North Carolina-South Carolina State line, thence southeastward along the North Carolina-South Carolina State line to the Atlantic Ocean, and thence Northeastward along the coast and the west bank of New River to Jacksonville, N.C., including points on that line.

Lumber, flakeboard, pulpboard, sheets and boards and millwork,

From points in that part of North Carolina bounded by a line beginning at Jacksonville, N.C., and extending northward along U.S. Highway 258 to the North Carolina-Virginia State Line, thence westward along the North Carolina-Virginia State line to junction U.S. Highway 301, thence southward along U.S. Highway 301 to Rocky Mount, N.C. thence along U.S. Highway 64 to Raleigh, N.C. thence along U.S. Highway 401 to the North Carolina-South Carolina State line, thence southeastward along the North Carolina-South Carolina State line to the Atlantic Ocean, and thence Northeastward along the coast and west bank of New River to Jacksonville, N.C., including points on that line, to Baltimore, Md., points in Virginia on the east of U.S. Highway 15 (except those in Accomack and Northampton Counties, Va.), and points in

Pennsylvania on and east of a line extending from the Maryland-Pennsylvania State line along Interstate Highway 83 (formerly U.S. Highway 111) to York, Pa., on and south of a line extending from York along U.S. Highway 30 to junction of U.S. Highway 202, and thence along U.S. Highway 202 via New Hope, Pa. to the Pennsylvania-New Jersey State line.

RESTRICTION: The operating rights in the last two paragraphs are restricted against the transportation of traffic originating at Franklin or Norfolk, Va., or points within 20 miles thereof, and destined to Baltimore, Md., or Philadelphia, Pa., or points within 5 miles thereof and, conversely, traffic originating at the said Baltimore-Philadelphia points and destined to the said Virginia points.

Lumber,

From points and places in that part of North Carolina on and east of U.S. Highway 29, to points and places in Virginia, Delaware, Maryland, New Jersey, Pennsylvania, and the District of Columbia.

with no transportation for compensation on return as otherwise authorized to the above specified origin points.

Lumber, except plywood and veneer,

From points in that part of North Carolina on and east of U.S. Highway 29 to points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Ohio, Illinois, Indiana, West Virginia, Kentucky, Tennessee and Florida with no transportation for compensation on return except as otherwise authorized.

Hardboard Sheets and Boards,

From Catawba, S.C., and points within five miles thereof, to Dover, Del., and points in Connecticut,

New York (except points in the New York, N.Y. Commercial Zone, as defined by the Commission), and New Jersey (except in the Trenton, N.J., Philadelphia, Pa., and New York, N.Y. Commercial Zones, as defined by the Commission), with no transportation for compensation on return except as otherwise authorized.

Flakeboard,

From Farmville, N.C., to points in Delaware, Georgia, Maryland, New Jersey, Pennsylvania, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Virginia, Kentucky, Florida, Iowa, Wisconsin, and the District of Columbia, with no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The authority granted herein is restricted to the transportation of shipments originating at Farmville, N.C. and destined to points in the above-described destination territory.

Lumber and particle board,

From the plant site and storage facilities of Union Camp Corporation at Franklin, Va., to points in Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and the District of Columbia, with no transportation for compensation on return except as otherwise authorized.

Wood fiberboard,

From Moncure, N.C., to points in Connecticut, Georgia, New Jersey, South Carolina, and Virginia, with no transportation for compensation on return except as otherwise authorized.

The authority granted herein to the extent that it duplicates any authority heretofore granted to or now held by carrier shall not be construed as conferring more than one operating rights.

Service Date Nov. 21, 1974

Corrected Order *

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 29th day of October, October, 1974.

No. MC-F-10522 [1]

OLD DOMINION FREIGHT LINE—CONTROL—
BARNES TRUCK LINES, INC.

Upon consideration of the record in the above-entitled proceedings, including the initial decision of the Administrative law judge served July 31, 1974, which denied the application herein under section 5 of the Interstate Commerce Act, without prejudice to the submission of a revised proposal, the decision and order of the Commission, Division 3, served January 11, 1974, which approved the transfer of the authority set out in the appendix hereto, but found large portions of the vendor's authority to be dormant, the petition of applicants filed April 23, 1974, seeking further hearing or alternatively reconsideration on the present record of said decision and order, and the reply thereto filed July 22, 1974, by protestant Colonial Motor Freight Line, Inc.;

It appearing, That the applicants allege that the Division erred in finding large portions of the vendor's authority to be dormant; that, in addition, through an inadvertent error, the decision and order deleted the general commodity authority of vendor from Wilmington, N.C., to Smithfield, N.C., and described the Virginia destination area of the vendor's general commodity authority between Wilson, N.C., and points in Virginia as points in Virginia

* This order was corrected to show the proper highway numbers in the first appearing paragraph herein.

[1] This proceeding also embraces Finance Docket No. 25769, Old Dominion Freight Lines—Extension—Conversion.

south of a prescribed line; that the decision and order should be modified (1) to include in the authority to be retained by Barnes Truck Lines, Inc., and acquired by Old Dominion Freight Lines, Inc., the authority from Wilmington, N.C., to Smithfield, N.C., and (2) to redescribe the description of the said Virginia destination area under general commodity authority as follows:

> "and that points in Virginia on and south of a line drawn from Danville over U.S. Highway 360 to Richmond and thence over U.S. Highway 60 to Norfolk."

It further appearing, That, except as previously set forth the petition seeking further hearing, or alternatively reconsideration, and the reply thereto, raise no new or material matters not adequately considered by the Division; and that there

It further appearing, That this decision is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969:

It is ordered, That the said petition for further hearing, or, alternatively, reconsideration, except to the extent granted herein be, and they are hereby, denied; and that the decision and order of December 19, 1973, except or modified herein, shall be, and it is hereby, adopted as the order of the Commission, Division 3, acting as an Appellate Division, effective 35 days from the date of service hereof;

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Service Date Dec. 20, 1974

Corrected Order *

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 29th day of October, October, 1974.

No. MC-F-10522 [1]

OLD DOMINION FREIGHT LINE—CONTROL—
BARNES TRUCK LINES, INC.

Upon consideration of the record in the above-entitled proceedings, including the initial decision of the Administrative law judge served July 31, 1974, which denied the application herein under section 5 of the Interstate Commerce Act, without prejudice to the submission of a revised proposal, the decision and order of the Commission, Division 3, served January 11, 1974, which approved the transfer of the authority set out in the appendix hereto, but found large portions of the vendor's authority to be dormant, the petition of applicants filed April 23, 1974, seeking further hearing or alternatively reconsideration on the present record of said decision and order, and the reply thereto filed July 22, 1974, by protestant Colonial Motor Freight Line, Inc.;

It appearing, That the applicants allege that the Division erred in finding large portions of the vendor's authority to be dormant; that, in addition, through an inadvertent error, the decision and order deleted the general commodity authority of vendor from Wilmington, N.C., to Smithfield, N.C., and described the Virginia destination area of the vendor's general commodity authority between

* This order is being served in order to correct omissions in the corrected order of the Commission, Division 3, acting as an Appellate Division, served November 21, 1974, contained in the first "It further appearing" paragraph.

[1] This proceeding also embraces Finance Docket No. 25769, Old Dominion Freight Lines—Extension—Conversion.

Wilson, N.C., and points in Virginia as points in Virginia south of a prescribed line; that the decision and order should be modified (1) to include in the authority to be retained by Barnes Truck Lines, Inc., and acquired by Old Dominion Freight Lines, Inc., the authority from Wilmington, N.C., to Smithfield, N.C., and (2) to redescribe the description of the said Virginia destination area under general commodity authority as follows:

> "and that points in Virginia on and south of a line drawn from Danville over U.S. Highway 360 to Richmond and thence over U.S. Highway 60 to Norfolk."

It further appearing, That, except as previously set forth the petition seeking further hearing, or alternatively reconsideration, and the reply thereto, raise no new or material matters not adequately considered by the Division; and that there has been no error of fact of law with respect to the matters complained of by the petitioner; and

It further appearing, That this decision is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969:

It is ordered, That the said petition for further hearing, or, alternatively, reconsideration, except to the extent granted herein be, and they are hereby, denied; and that the decision and order of December 19, 1973, except or modified herein, shall be, and it is hereby, adopted as the order of the Commission, Division 3, acting as an Appellate Division, effective 35 days from the date of service hereof.

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil No. C-75-14-G

OLD DOMINION FREIGHT LINE, INC.,

and

BARNES TRUCK LINE, INC.,
Plaintiffs

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants

and

COLONIAL MOTOR FREIGHT LINE, INC.,
Intervenor-Defendant

Judgment

The Court on August 15, 1975, filed its Memorandum of Decision and Judgment which is hereby incorporated herein and made a part of its Judgment.

Now, therefore, it is ORDERED, ADJUDGED, and DECREED that the orders of the Interstate Commerce Commission entered in Docket No. MC-F-10522, *Old Dominion Freight Line—Control—Barnes Truck Line, Inc.*, are hereby affirmed and plaintiffs' complaint is dismissed. It is further ORDERED that the temporary restraining order entered by the Court on January 23, 1975, is hereby vacated.

The parties shall bear their own costs.

FOR THE COURT:

/s/ HIRAM H. WARD
Hiram H. Ward
United States District Judge

September 4, 1975.

A True Copy

Teste:

Carmon J. Stuart, Clerk
By: /s/ [Illegible]
Deputy Clerk

No. 75-757

Supreme Court, U.S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

OLD DOMINION FREIGHT LINE, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
MICHAEL PUGH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ARTHUR J. CERRA,
General Counsel,

BETTY JO CHRISTIAN,
Associate General Counsel,

JAMES T. PROCTOR,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-757

OLD DOMINION FREIGHT LINE, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. C) dismissing an action to set aside an order of the Interstate Commerce Commission (J.S. App. D). The Commission's order had approved a merger of Barnes Truck Line, Inc. ("Barnes"), into Old Dominion Freight Line, Inc. ("Old Dominion"), conditioned upon the cancellation of a portion of Barnes' general commodity authority and of certain specific commodity authorities which were found to be dormant.

Under Section 5(2)(b) of the Interstate Commerce Act, 24 Stat. 380, 49 U.S.C. 5(2)(b), a motor carrier may

acquire control of, or merge with, another motor carrier only if the Commission finds that the proposed transaction "will be consistent with the public interest." In determining the public interest, the Commission has long held that operating rights that are "dormant," *i.e.*, that have not been actively utilized by the transferor, may not be transferred unless it is demonstrated that the service authorized by the dormant rights is required by the public convenience and necessity. See *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98 (W.D. Texas), affirmed, 389 U.S. 569.

Prior to 1969, appellant Barnes held certain general commodity rights in parts of a five-state area on the East Coast, and several specific commodity certificates to and from points in the East and Southeast. On June 24, 1969, appellant Old Dominion sought Commission authorization to acquire control of Barnes. Protests were filed by competing carriers, including appellee Colonial Motor Freight Line, Inc. Following lengthy hearings, an Administrative Law Judge concluded that substantial portions of Barnes' general commodity rights were dormant and recommended that the application be denied without prejudice to the parties' submission of a revised plan eliminating the dormant rights (J.S. App. D, 54a-55a).

On exceptions, Division 3 of the Commission upheld the law judge's findings (J.S. App. D, 57a-58a). In addition, Division 3 concluded after review of the evidence that, since virtually all shipments transported by Barnes between December 1968 and May 1969 under specific commodity authority had consisted of lumber and related products, Barnes' specific commodity authority was dormant except for the transportation of those products

(J.S. App. D, 59a). Accordingly, Division 3 held that the transfer of Barnes' special commodity rights should be limited to "the transportation of lumber, flakeboard, pulpboard and other lumber-related commodities" in its operating area (*ibid.*). A petition seeking further hearing or reconsideration, alleging that Division 3 had erred in finding large portions of Barnes' authority to be dormant, was denied by Division 3 (acting as an Appellate Division) because the number of shipments was "insignificant and are not of sufficient caliber to justify classifying the authority as active" (J.S. App. D, 71a).

On review, the three-judge district court unanimously affirmed, holding that the "Commission['s] decision was based on a consideration of the relevant factors and that there has not been a clear error of judgment" and "that the Commission's action was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that it is supported by substantial evidence" (J.S. App. C, 13a).

ARGUMENT

The sole issue presented by this appeal is whether the Commission properly applied certain well-established principles for determining the dormancy and transferability of operating authorities. This essentially factual determination, and the discretionary judgment whether such transfer would be in the public interest, do not warrant plenary review. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607. The decision below is correct and should be affirmed.

1. Appellants' principal contention (J.S. 9-16) is that the district court erroneously sanctioned the Commission's departure from the "substantiality test" that has long been utilized in determining whether particular operations

are dormant. This claim is based entirely upon the Commission's failure to use the precise words "substantiality test" in its report, or explicitly to reiterate the factors traditionally considered under that test. A review of the Commission's decision, however, indicates that it in fact employed the "substantiality test" in evaluating the evidence of Barnes' operations. The Commission, for example, expressly analyzed those operations in terms of the accepted "substantiality test" criteria: (1) the nature of the rights involved (J.S. App. D, 18a-19a); (2) the actual use of those rights (*id.* at 19a, 22a, 30a-34a, 42a-43a); (3) the rights and actual operations of other motor carriers in the affected area (*id.* at 35a-51a); and (4) other significant factors such as the economic health and potential of the area served (*id.* at 53a, n. 8). On the basis of this detailed analysis, the Commission concluded that Barnes' general commodity rights were "practically dormant" (*id.* at 53a) and that its specific commodity rights were "dormant for all practical purposes" (*id.* at 59a), and characterized the shipments under both authorities as "insignificant and * * * not of sufficient caliber to justify classifying the authority as active" (*id.* at 71a).

These findings, all of which were supported by evidence that appellants do not challenge as insubstantial, were clearly sufficient to permit "the agency's path [to] be discerned," *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc., supra,* 419 U.S. at 286, and the district court therefore correctly concluded that "the decision of the Commission was based on a consideration of the relevant factors" (J.S. App. C, 13a).[1]

[1]Indeed, appellants' claim that the Commission improperly departed from the "substantiality test" is further weakened by their concession (J.S. 14) that the test "has been consistently applied in past and subsequent decisions whenever the Commission has had to measure the past activity of operating authority sought to be transferred in Section 5 proceedings."

2. Since the Commission's order did not depart from the "substantiality test," there is nothing to appellants' claim that the decision of the court below conflicts with that of another district court in *Wright Trucking, Inc.* v. *United States,* D. Mass., Civ. No. 73-1445-C (April 3, 1975). In *Wright,* the reviewing court had difficulty understanding the Commission's conclusion that a carrier's rights were dormant and, accordingly, remanded the case to the Commission for an expanded articulation of its reasons. Here, the district court concluded that the Commission's finding of dormancy was supported by the evidence, adequately explained, and legally correct. Similarly, there is no conflict between the Commission's decision in this case and its finding some seven years earlier that, when the license now owned by Barnes was held by Coker Freight Lines, the operations conducted by Coker were substantial and the rights were not then dormant.[2] The two decisions involved the operations of separate carriers, conducted during entirely different time periods. A finding of active operations at one point certainly does not preclude a finding of dormancy at a subsequent point.

3. The Commission's decision also does not violate the admonition of *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, against "atomization" of operating rights. Even apart from the fact that *Carolina* involved a different statute,[3] under which the Commission's

[2]*Barnes Truck Line, Inc.—Purchase—Coker Freight Lines, Inc.*, Docket No. MC-F-9343.

[3]*Carolina* involved the "grandfather" clause of Section 206(a) of the Act, 49 U.S.C. 306(a), which required the Commission to issue a certificate upon proof that the carrier had engaged in bona fide operations on and since the statutory cut-off date "without requiring further proof that public convenience and necessity will be served by such operation." Under Section 5, in contrast, the Commission has extremely broad power to determine whether, and upon what terms and conditions, a proposed acquisition will be consistent with the public interest. *McLean Trucking Co.* v. *United States,* 321 U.S. 67.

powers were more limited than under Section 5, the Court there emphasized the power of the agency to restrict a carrier's certificate when its "holding out and actual performance were limited to a few articles only" (315 U.S. at 483) or were geographically "confined to narrow limits" (315 U.S. at 481). As appellants concede (J.S. 9-16), the Commission consistently has refused to approve the transfer of dormant rights in a Section 5 proceeding. This well-established policy, which has repeatedly been upheld by the courts, is designed to prevent the authorization of a *de facto* new service in contravention of the express legislative directive (49 U.S.C. 307) requiring a showing of public convenience and necessity before a certificate authorizing new operations may be issued. See *Consolidated Copperstate Lines* v. *United States*, 393 F. Supp. 858 (C.D. Cal.), affirmed, 394 U.S. 719. The conditions imposed by the Commission's approval in the instant case simply precluded the transfer of certain operating authorities that Barnes had not actively utilized prior to the proposed transaction, and were thus fully in accord with *Carolina* and with the agency's responsibilities under Section 5 of the Act.

4. Furthermore, the Commission's decision adequately considered its impact upon carrier employees. Contrary to appellants' contention (J.S. 27), the Commission need not make specific findings concerning an applicant's employees, but only is required by Section 5(2)(c) to "give weight" to this factor. See *M & M Transportation Co.* v. *United States*, 128 F. Supp. 296 (D. Mass.), affirmed, 350 U.S. 857. Here, the Commission expressly concluded that such employees would not be adversely affected by its order (J.S. App. D, 60a); that conclusion is entirely rational in light of the fact that the Commission authorized the transfer to Old Dominion of all authority under which operations had been actively conducted by Barnes. Compare *American Buslines, Inc.* v.

United States, 253 F. Supp. 481 (D. D.C.), affirmed, 385 U.S. 38. Moreover, appellants failed to raise this matter in a timely fashion in the administrative proceedings.[4] See *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

Nor did the Commission err in refusing to consider operations conducted subsequent to negotiations for the sale of Barnes' operating rights. Except in unusual circumstances, the Commission rarely has given weight to operations conducted after the transferee has obtained temporary control of the transferor, see *Buckingham Transportation, Inc.—Control and Merger*, 80 M.C.C. 245; *Cassens Transport Co.—Purchase—Speedway Transports*, 70 M.C.C. 379, and the courts have consistently recognized that the Commission is under no obligation to consider such operations. See, *e.g.*, *C & H Transportation Co., Inc.* v. *United States*, 249 F. Supp. 97 (N.D. Texas).

Bowman Transportation, Inc.—Control and Merger, 93 M.C.C. 133, on which appellants rely, is inapposite because there, unlike the present proceeding, evidence of operations conducted under temporary authority was adduced by the carrier at the proper time for the purpose of demonstrating that the protestant's services were inadequate and that the new service instituted under temporary authority was therefore required by the public need. Here, however, appellants did not raise the issue of the inadequacy of existing service during the initial

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[4]The issue was raised for the first time by appellants in a petition filed after the administratively final decision had been rendered by the Commission. While the petition alleged that "more than one hundred employees" would have to be terminated due to the ordered cancellation, the administrative record contained no evidence in support of that allegation nor any proof that Barnes had ever employed that many employees. Indeed, prior to filing the petition, appellants had stated in a petition to amend their application, filed after the Administrative Law Judge's decision, that carrier employees would not be adversely affected.

proceedings and no evidence of public need for new service was proffered until the filing of shipper affidavits in support of a petition for rehearing. The Commission's rejection of the petition and supporting affidavits at that stage was a proper exercise of its discretion. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 294-296; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
MICHAEL PUGH,
Attorneys.

ARTHUR J. CERRA,
General Counsel,

BETTY JO CHRISTIAN,
Associate General Counsel,

JAMES T. PROCTOR,
Attorney,
Interstate Commerce Commission.

JANUARY 1976.

DOJ-1976-01

Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-757

OLD DOMINION FREIGHT LINE, INC.
and
BARNES TRUCK LINE, INC.,
v. *Appellants*
UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
and
COLONIAL MOTOR FREIGHT LINE, INC., et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina, Greensboro Division

MOTION TO AFFIRM OF APPELLEE COLONIAL MOTOR FREIGHT LINE, INC.

EDWARD G. VILLALON
1032 Pennsylvania Bldg.
Pennsylvania Ave. & 13th St., N.W.
Washington, D.C. 20004

Counsel for Appellee Colonial Motor Freight Line, Inc.

Of Counsel:
WILSON, WOODS & VILLALON
1032 Pennsylvania Bldg.
Pennsylvania Ave. & 13th St., N.W.
Washington, D.C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

13205-12-75

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IN THE

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OCTOBER TERM, 1975

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CLD DOMINION FREIGHT LINE, INC.

and

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Appellants

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION

and

COLONIAL MOTOR FREIGHT LINE, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina, Greensboro Division

MOTION TO AFFIRM OF APPELLEE COLONIAL MOTOR FREIGHT LINE, INC.

Pursuant to Rule 16(1)(c) of the Supreme Court Rules, Appellee Colonial Motor Freight Line, Inc. ("Colonial") [1] moves the Honorable Court to affirm

[1] Colonial was a party protestant in the proceeding complained of before the Interstate Commerce Commission ("Commission") and an intervenor-defendant in the Court below.

the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.[2]

PRELIMINARY STATEMENT

Appellee Colonial takes no exception to the Jurisdictional Statement references to OPINION BELOW, JURISDICTION, and STATUTES INVOLVED. It believes that the only question presented on this appeal is whether the Commission's action, findings, and conclusions were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law or supported by substantial evidence. Administrative Procedure Act, Sec. 706(2); 5 USC Sec. 706(2); *Bowman Trans.* v. *Arkansas Best Freight*, — U.S. —, 42 L.Ed. 2d 454, 455 (1974), rehearing denied, 43 L. Ed. 2d 433 (1975). For the purposes of this Motion, however, argument below is drawn along the lines of the questions presented and argument of the Jurisdictional Statement. The statement of the case is accurately reflected in Appendices C and D to the Jurisdictional Statement.

ARGUMENT

I. The Bases of the Commission's Finding of Partial Dormancy Are Made Clear and Are Consistent with Its Pertinent Prior Decisions

Appellants' contentions that in arriving at its conclusion of partial dormancy in the rights of Barnes Truck Line, Inc. ("Barnes") transferable to Old

[2] *Zucht* v. *King*, 260 U.S. 174, 176 (1922); *Sugarman* v. *U.S.*, 249 U.S. 182, 184 (1919); *Equitable Life Assurance Soc. of the U.S.* v. *Brown*, 187 U.S. 308, 311 (1902).

Dominion Freight Line, Inc. ("Old Dominion"), the Commission "failed to apply established standards for determining transferability," "failed to follow the substantiality test,"[3] and failed to announce and explain a departure from "long adhered to standards or policies" (Juris. Stmt., pp. 9-16) are without merit.

Beginning with the report and order of the Administrative Law Judge and repeatedly in each subsequent Commission order complained of, the decisional rationale was made clear. In this regard, three principles are of utmost importance for consideration: First, the Barnes' certificates sought to be transferred authorize the transportation of the broadest type commodities (general commodities) on a statewide basis between all points in North Carolina, South Carolina and Virginia, on the one hand, and, on the other, points in southeastern Pennsylvania and Baltimore, Md. The Commission has held in analogous cases that where such broad rights are sought to be transferred, applicants have a "heavier burden to prove the operating rights were active than in most cases. Such rights, if really active, could attract a large volume of traffic in this area."[4] Secondly, the sole statutory criterion governing the disposition of the acquisition proposed is whether the transaction is "consistent with the public interest."[5] In *Virginia Stage Lines, Inc.* v. *U.S.* (D.C.W.D. Va. 1942), 48 F.Supp. 79, 82, Circuit

[3] As enunciated by the Commission in *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc.*, 75 M.C.C. 659 (1958).

[4] *Glosson Motor Lines, Inc.—Purchase—Helderman*, 101 M.C.C. 151, 158 (1966).

[5] Sec. 5, Interstate Commerce Act, 49 U.S.C. § 5.

Judge Dobie, speaking for a statutory three-judge court on review of Commission orders, observed:

> "It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than Section 5 of the Interstate Commerce Act"

He also quoted from this Court's opinion in *Alton Railroad Co.* v. *U.S.*, 315 U.S. 15, 23 (1942), that:

> "The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the courts."

And, third, the question of dormancy is one of fact. *Miami Transp. Co. of Ind.—Purchase—Strothman*, 97 M.C.C. 600, 608 (1964); *Blue Ridge Transfer Co.* v. *U.S.*, 283 F.Supp. 858, 860 (D.C.W.D. Va. 1968).

The Administrative Law Judge expressly found that the three general commodity carrier protestants (including Colonial) recognized that the Barnes rights are not dormant insofar as actually operated. He continued (Juris. Stmt., App. D, p. 53a) that:

> "They are on solid ground when they argue that, as alternative to complete denial, Barnes general commodity rights which are practically dormant, should be cancelled except. . . . (3) as to limited commodities, principally iron and steel and iron and steel articles from the described area in southeastern Pennsylvania and Baltimore, and lumber, flakeboard, pulpboard, sheets and boards, and millwork from the southeastern area to the described northern points."

He further found:

> "Going beyond the interest of each protestant, the focal aspect of this proceeding is the use to which OD would put BTL's rights in Virginia and the Carolinas-blanketing them with a small-shipment, general commodity peddle-service. It is no answer to the objection of protestants regarding the Brady criteria, supra, to say as does OD, that it may move to have BTL's irregular-route rights converted to regular-route rights between its principal points, when the statement comes before the obvious fact. It is clear from OD's frankly stated intentions, and its express showing, that it would use, and under temporary control is using, BTL's rights in a manner not intended."[6]

This latter quotation relates to the proposal of Old Dominion to overlap within Virginia and the Carolinas its existing regular-route, small shipment, general commodity service with an irregular-route service authorized under the Barnes certificates, thus constituting a new service and, indeed, one not intended by reason of the nature of the irregular-route certificates of Barnes.

He made detailed findings with respect to facts bearing on the issue of dormancy in regard to lack of terminal expenses, type of equipment operated, absence of terminals within the Barnes system with which to handle less-truckload general commodity traffic and other seemingly minutiae but bearing on the issue of dormancy (Juris. Stmt., App. D, pp. 16a-20a, 22a-24a, 26a, 30a-34a, 36a-53a, incl.). All of the evidence sup-

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[6] Citing *Falwell Fast Frt., Inc. —Pur.—Draper and Evans Line, Inc.*, 40 M.C.C. 439, aff'd, *Falwell* v. *United States*, 69 F.Supp. 71, aff'd *per curiam*, 330 U.S. 807.

porting these findings (to which appellants have not taken exception) support his conclusion that the general commodity rights should be cancelled with the stated exceptions.

Moreover, he reviewed judicial construction of the phrase "consistent with the public interest" and observed that those statutory words comprehended the interest of competing carriers, and the Commission considers the interest of such carriers, as well as the advantages and disadvantages which may accrue to the general public, citing *Mushroom Transp. Co., Inc.-Control-Smith & Howell Film,* 87 M.C.C. 584, 589 (1961) and *Matlack, Inc.-Control-Southern & T.I. McCormack,* 109 M.C.C. 861 (1971). Both of those cited cases dealt with the question of dormancy. In both cases, the test of substantiality as enunciated in the *New Dixie* case, *supra,* was cited and applied.[7] Each subsequent order of the Commission as pertinent to the issue of dormancy within the context of this appeal adopted the findings and conclusions of the Administrative Law Judge and added independent findings on the Commission's part (Juris. Stmt., App. D, pp. 59a, 71a, 79a, 81).

There is clearly a rational basis for the conclusions reached by the Commission in this case. *Mississippi Valley Barge Line Co.* v. *U.S.,* 292 U.S., 282 (1934).

2. The Wright Trucking Decision Is Distinguishable

Appellants' contention that there is a conflict between the decision of the District Court below and that of the statutory three-judge District Court of Mas-

[7] It was pointed out at oral argument before the Court below that the Administrative Law Judge who heard the instant case also heard the *New Dixie* case in which the test of substantiality was first articulated.

sachusetts in *Wright Trucking, Inc.* v. *U.S.* (C.A. No. 73-1445-C, April 3, 1975) is erroneous. Appellants bottom their contention on the proposition that the District Court below simply affirmed the Commission's Decision and Orders without comment on or discussion of the issues raised by appellants, thereby tacitly approving the Commission's dormancy determinations without application of its traditional substantiality test. That the Administrative Law Judge and the Commission made findings, all of which were supported by substantial evidence, bearing on standards in determining dormancy has been demonstrated above. Bearing in mind that the so-called "substantiality test" requires than an irregular-route carrier such as Barnes must submit evidence showing that it has rendered *substantial* service to a *representative* number of points within its territory to show that its operations have been *substantial* and *continuous,* as distinguished from occasional or sporadic, it is clear that the Commission adhered to that test of substantiality in the instant case.

The Court in the *Wright* case simply found that the Commission had failed to explain the basis of its decision. There is no such absence of explanation in the instant case. As has been pointed out, the Commission in *Miami Transp. Co., Inc. of Ind.—Pur.—Strothman,* 97 M.C.C. 600, 608 (1964), held that the test of substantiality enunciated by the *New Dixie* case is not a yardstick whereby the Commission can measure the operations and say that less than "x" shipments daily or monthly equals dormancy. The test, the Commission said, was elastic, and that the number of shipments held to amount to dormancy in one case will vary from that in another.

In view of the extraordinarily broad administrative discretion delegated to the Commission by Congress un-

der Sec. 5 of the Act. *Wright* may not be considered to be in conflict with the decision below. Each case must stand on its own record.

3. The Commission's Decision Is Not Inconsistent with Its Earlier Decision in the Coker Case

Appellant contends that the Commission's actions herein are arbitrary and capricious because it had earlier authorized the transfer of the Barnes' rights in *Barnes Truck Line, Inc.—Purchase—Coker Freight Line, Inc.*, Docket No. MC-F-9343. The thrust of this argument is that the Commission's decision is inconsistent with that in the *Coker* case and that the Commission is, in effect, estopped from finding dormancy in the instant case. This argument is without merit for the following reasons:

A. The doctrine of *res adjudicata* is not applicable in connection with the exercise of the Commission's quasi-judicial functions. *Arco Auto Carriers, Inc. Ext.—Milwaukee*, 49 M.C.C. 731, 770 (1949); *Monumental Motor Tours, Inc. Ext.—23 States*, 77 M.C.C. 259, 262 (1958); *Capitol Bus Co. Ext.—Elmira—Wilkes-Barre*, 83 M.C.C. 559, 560-561, 564 (1960); *Carl Subler Trucking, Inc. Ext.—10 States*, 77 M.C.C. 633-635 (1958).

B. It is not the function of a reviewing court to determine whether a Commission's decision is consistent with other rulings. *Virginian Railway Co.* v. *U.S.*, 272 U.S. 658; *Virginia Stage Lines* v. *U.S.*, 48 F.Supp. 79 (W.D.Va. 1942).

C. The "new service" potential of Old Dominion, a less-truckload general commodity carrier in the truest sense, in the acquisition of the broad Barnes rights is a factor recognized by the Commission in the instant

case and held to be of decisional significance. This new service potential was not present in the Barnes acquisition of the Coker rights by reason of the historically limited manner in which Barnes had been operated, i.e., through limiting its operations to truckload service, utilizing no terminals operationally required for the handling of less-truckload traffic, utilizing flatbed trailers primarily (not suitable for general commodity freight), and transporting freight on a highly selective basis, both in terms of commodities and territory.

4. The Commission Approved the Transfer of All Operating Authority Where Applicants Had Met the Substantiality Test.

Appellants' reliance on *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), is misplaced. Appellees have never admitted that Barnes handled numerous shipments of commodities other than iron and steel articles southbound and lumber and related items northbound under the involved general commodity authority on a substantial basis to a representative number of points within the pertinent territory. Colonial's position from the very outset of the proceeding before the Commission was that Barnes in the past under the general commodity authority had limited its service essentially to the transportation of these type commodities and the proof adduced in evidence by Barnes discloses that in the movement of traffic other than the type approved for transfer, its operations had been extraordinarily occasional, sporadic or non-existent. The limiting of Barnes' actual service and indeed its holding out was corroborated by testimony of record before the Commission of the surviving Barnes brother. In addition, analyses of appellees' own traffic abstracts demonstrated the extraordinarily limited operations

performed under the pertinent general commodity rights. In *United States* v. *Carolina Freight Corp., supra,* this Court was concerned with the interpretation of Sec. 206(a) of the Interstate Commerce Act with respect to whether a carrier had been in "bona fide operation" during the critical statutory periods with regard to the issuance of grandfather certificates. As related to territorial limitations placed on the grandfather grant in that case, at 315 U.S. 480, 481, this Court observed:

> "The Act provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald v. Thompson, 305 U.S. 263. *Substantial as distinguished from incidental, sporadic, or infrequent, service is required.* Substantial service actually rendered may have been confined to narrow limits. Loving v. United States (DC) 32 F.Supp. 464, affirmed in 310 U.S. 609, 84 L.ed. 1387, 60 S.Ct. 898. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed." (Emphasis supplied.)

With regard to the commodity restrictions imposed in the grandfather certificate there involved, the Court also observed (315 U.S. 483):

> "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities. See Re Galveston Truck Line Corp. 22 M.C.C. 451, 467. Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded. Loving v. United States (DC) 32 F. Supp. 464, affirmed in 310 U.S. 609, 84 L.ed. 1387, 60 S.Ct. 898, *supra,* was such a case."

The evidence of record therefore demonstrates that other than only on incidental, sporadic or infrequent occasions, Barnes had transported on a substantial basis only those commodities which the Commission approved for transfer. There is absolutely no conflict between the actions of the Commission in the instant case and this Court's holdings in the *Carolina Freight Carriers Corp.* case.

Nor is the Commission's decision here in conflict with other Commission decisions as contended by appellants (Juris. Stmt., pp. 24, 25). Contrary to the statement of appellants, Colonial contended from the outset that the only commodities transported by Barnes on a substantial basis to representative points were those authorized for transfer by the Commission. To the extent that Barnes participated in the transportation of any other commodities, such services was at best sporadic or occasional, and certainly insufficient to meet the test of substantiality. As indicated above, the Administrative Law Judge made express findings with regard to the failure of appellants to demonstrate that the general commodity authority sought to be transfered had been fully operated. Similarly, the Commission itself found:

> "The the evidence of record, particularly applicants' shipping abstracts at Exhibits 71-72 show that of approximately 500 shipments carried in the period December 1968 through May 1969, under special commodity authority, virtually all consisted of lumber and related products, so that Barnes' specified commodity authority was dormant for all practical purposes except for the

transportation of lumber, flakeboard, pulpboard and other lumber-related commodities from North and South Carolina and the 'uncontested' area of Virginia, *a situation consonant with the use of Barnes' general commodity authority based in the Carolina, which was also used largely for transporting lumber-related commodities;* that no shipper testimony was presented to justify reactivation of the dormant rights." (Emphasis supplied.) (Decision and Order served January 11, 1974, Juris. Stmt., p. 59a)

And again in its Order served November 6, 1974 (Juris. Stmt., p. 71a), the Commission found that:

"Even though the vendor showed some shipments under those portions of its authority that had been ordered cancelled, the number of shipments are insignificant and are not sufficient caliber to justify classifying the authority as active, and that applicants have not submitted evidence to justify reactivation of the dormant rights or shown the decision and order of December 19, 1973 to be in error;"

Appellants would have this Court (as they did the Court below) weigh the evidence adduced herein and substitute its judgment as to whether traffic abstracts offered in evidence before the Commission showed sufficient traffic to meet the test of substantiality. This is simply not the function of this Court. *Alton Railroad Co. v. U.S., supra; Miami Transp. Co. of Ind.—Pur.—Strothman, supra.*

5. The Commission Considered All Relevant Evidence and Its Refusal To Reopen the Record for Further Hearing Was Not an Abuse of Discretion.

Appellants' contention that the Commission's dormancy findings "struck the very heart" of the Barnes operating authority, i.e. its general commodity author-

ity, and as a result of such findings, carrier employees would be adversely affected is at war with the facts and otherwise erroneous.[8] The evidence of record demonstrates that prior to coming under the influence of Old Dominion under temporary management, Barnes never conducted a general commodity operation but rather limited its transportation activities to the movement of highly selected commodities essentially on flat-bed trailers and to a highly selective territory. Barnes had only two employees at Baltimore, with a number of drivers being available for utilization in the southbound transportation of iron and steel articles, but had no dockmen stationed there who normally would be utilized in the dockhandling of general commodity freight. In fact, except for the Barnes facility at Wilson, N.C. (its home office), Barnes had never operated a facility anywhere which was suitable for the handling of less-truckload general commodity freight. While appellants estimate that 100 employees will be laid off as a result of the Commission's order requiring cancellation of the Barnes' east-south general commodity authority, the record demonstrates that such employees were added

[8] With respect to the adverse affect on Colonial resulting from Old Dominion's continued temporary operations of Barnes, Colonial's Vice President—Traffic submitted an affidavit to the Court below in opposition to appellees' Motion for Temporary Restraining Order in which he pointed out that his company had suffered substantially with regard to loss of traffic by specific shippers during the period of temporary operations of Barnes by Old Dominion, that during the last seven months of 1974, his company's total system revenues had decreased dramatically ($624,094 in June to $373,733 in December). With specific regard to Colonial's operations to and from Baltimore and the south, he showed substantial reduction in tonnage and revenue for the last three months of 1973 to the last three months of 1974. He also demonstrated that his company had to park 30 expensive van trailers simply because it did not have enough revenue traffic to fully utilize them.

by Old Dominion after it took over temporary operations of Barnes. Indeed, in its amendment to the application from one of control to one of merger filed with the Commission on December 4, 1972, Old Dominion stated:

> "E-5. During the period of temporary authority opportunities for the employees of both transferor and transferee have expanded. Accordingly, it is believed that approval of the transaction will not adversely affect any carrier employees."

In short, the build-up of employees during temporary operations was brought about at the election of Old Dominion in the face of continuing adverse decisions of the Commission on the issue of dormancy.

With respect to the appellants' contentions that the Commission failed to consider operations under temporary authority and shipper affidavits, this argument merely attacks the propriety of the Commission's refusal to reopen the record for further hearing. Appellants have not and cannot demonstrate that such refusal was an abuse of the Commission's broad discretion in this area. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, —— U.S. ——, 42 L.Ed.2d 447 (1974), rehearing denied, 43 L.Ed.2d 433 (1975).

CONCLUSION

For the foregoing reasons, the Memorandum of Decision and Judgment of August 15, 1975, and Final Judgment entered on September 8, 1975, by the Court below, affirming orders of the Interstate Commerce Commission in MC-F-10522, *Old Dominion Freight Line—Control—Barnes Truck Line, Inc.*, should be affirmed.

Respectfully submitted,

EDWARD G. VILLALON
1032 Pennsylvania Bldg.
Pennsylvania Ave. & 13th St., N.W.
Washington, D.C. 20004

Counsel for Appellee Colonial Motor Freight Line, Inc.

Of Counsel:

WILSON, WOODS & VILLALON
1032 Pennsylvania Bldg.
Pennsylvania Ave. & 13th St., N.W.
Washington, D.C. 20004

Supreme Court, U. S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

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INTERSTATE COMMERCE COMMISSION AND
COLONIAL MOTOR FREIGHT LINE, INC., ET AL.,
Appellees.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

FRANCIS W. McINERNY
RICHARD A. MEHLEY
1000 - 16th Street, N.W.
Washington, D.C. 20036
Attorneys for Appellants

Of Counsel:

MACDONALD & McINERNY
1000 - 16th Street, N.W.
Washington, D.C. 20036

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 16(4) of the rules of this Court, appellants Old Dominion Freight Line, Inc. and Barnes Truck Line, Inc., submit this brief in opposition to the motions filed by the United States and Interstate Commerce Commission and by intervening appellee, Colonial Motor Freight Line, Inc., to affirm the decision and order of the United States District Court for the Middle District of North Carolina.

1. The Government's reliance upon *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, is misplaced. The result of this Court's decision (as well as the Commission's) in that case was to expand the competitive scene and permit entry of additional competing carriers, whereas the effect of the Commission and lower court decisions in the instant proceeding is to the contrary, i.e. to restrict competition by reducing the amount of available carrier services in the involved market. Justice Douglas, speaking for a unanimous Court in *Bowman*, stated:

> "Our decisions have dispelled any notion that the Commission's primary obligation is the protection of firms holding existing certificates."

The Commission here, however, refused to acknowledge the real lessons of *Bowman* and has, wholly without record justification, over-protected the only opposing existing carrier.

2. The Government's attempt to distinguish the *Wright Trucking, Inc.* v. *United States*, D. Mass., Civ. No. 73-1445-C (April 3, 1975), decision and its rationale from the decision reached by the lower Court here is strained to the point of being misleading. The three judge court in *Wright* was concerned with the shifting standards apparently utilized by the Commission in passing upon motor carrier merger applications under Section 5 of the Act. The facts involved in the proceeding here under review present an even more graphic illustration of the Commission's refusal in some cases to apply with some degree of fairness and consistency the promulgated standard, i.e. the "substantiality test," favoring instead mere conclusionary findings and the complete absence of any articulation of a new standard. The court below did not find that the Commission had applied the "substantiality test" to the facts involved in this proceeding, nor did the Commission actually apply any standard with a rationalized explication, as a reading of the Commission decisions and orders clearly reveals, despite the Government's argument to the contrary. The court below failed to come to grips with issues raised, and simply rubber stamped or automatically sanctioned the Commission's abandonment of its "substantiality test," which decision is entirely contrary to that reached by the court in *Wright*.*

3. Finally, appellee's assertion that this Court's admonition in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, against "atomization" of motor carrier operating authorities actually sanctions the Commission action here is wholly without foundation. The Commission has since *Carolina* decision consistently applied the teaching of that case, including the Court's admonition against "atomization," in motor carrier merger cases. (See Appellants' Jurisdictional Statement, pp. 22-24) As a final matter, the Government's argument to the effect that *Carolina* somehow sanctions the Commission action here borders on the absurd, for it would require one to ignore the numerous commodities and shipments handled by appellee Barnes under its general and special commodity authorities. In short, the Government says "forget the record", let's get to a conclusion supported or not by fact or reason.

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* As a pedestrian aside, it is worthy of note that the Commission did not appeal the District Court's decision.

CONCLUSION

The Commission and lower court both erred, and probable jurisdiction should be noted.

Respectfully submitted,

FRANCIS W. MCINERNY
RICHARD A. MEHLEY
Attorneys for Appellants

Of Counsel:

MACDONALD & MCINERNY
1000 - 16th Street, N.W.
Washington, D.C. 20036